Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

NIBCO, Inc.,
Petitioner,

v.

Martha Rivera, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court may enter a protective order precluding pre-trial discovery of a party's illegal activity despite the fact that the illegal activity is highly relevant to that party's claim.

2. Whether this Court's holding in *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137 (2002), that the Immigration Reform and Control Act precludes backpay awards to illegal aliens is limited merely to claims under the National Labor Relations Act.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are respondents here: Mao Her, Alicia Alvarez, Eva Ariola, Peuang Bounnhong, Chhom Chan, Bee Lee, Paula Martinez, Maria Domitilia Medina, Mai Meemouā, Margarita Mendoza, Bao Nhia Moua, Isidra Murillo, Maria Navarro, Vath Rattanatay, Ofelia Rivera, Sara Rivera, Maria Rodriguez, Maria Ruiz, Maria Valdivia, Sy Vang, Youa Xiong, and See Yang.

RULE 29.6 DISCLOSURE

Petitioner NIBCO, Inc. has no parent corporation and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner NIBCO, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The relevant opinions and orders of the magistrate judge (Pet. App. 60a-69a, 204 F.R.D. 647), the district court (*id.* 55a-59a; 70a-72a), the court of appeals (*id.* 1a-29a, 364 F.3d 1057; 73a), and the judges dissenting from the denial of rehearing en banc (*id.* 30a-54a, 384 F.3d 822) are reproduced in the Appendix.

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on September 20, 2004. See Pet. App. 31a. On December 16, 2004, Justice O'Connor extended the time to file this Petition to and including December 27, 2004. App. 04-521. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix (74a-75a).

STATEMENT OF THE CASE

In *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 140 (2002) (*Hoffman Plastic*), this Court held that an award of backpay to an undocumented alien who cannot lawfully work in this country is "foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." In a ruling obviously intended to circumvent this Court's holding, the Ninth Circuit (per Reinhardt, J.), declined to apply *Hoffman Plastic* to disparate impact claims under Title VII of the Civil Rights Act of 1964 (Title VII), instead upholding a protective order that

immunizes plaintiffs from pre-trial discovery regarding their immigration status.

Review is warranted for the reasons set forth in Judge Bea's extensive dissent from the denial of rehearing en banc, which was joined by three other judges. Pet. App. 31a-54a. The discovery precluded by the Ninth Circuit's ruling is essential to the trial rights of defendants in this recurring class of cases, for it determines whether the plaintiffs are entitled to the remedies they seek under Title VII and whether their state claims are barred. The panel's view that the discovery must be precluded as a matter of law because it would "chill" Title VII claims (*id.* 8a) is contrary to other courts' decisions establishing bedrock principles of federal discovery. Those courts recognize that plaintiffs have no right to avoid discovery of their own illegal conduct and that, to the extent a legitimate privacy interest exists, a more narrowly tailored protective order will avoid disclosure of the information to the authorities. The panel's contrary ruling "impedes the ascertainment of the truth in advance of trial, thereby profoundly subverting the purposes of liberal Discovery in civil cases," and "frustrates the purposes of national Immigration policy: to limit employment benefits to American citizens and foreign persons authorized to work in this country." *Id.* 31a.

Certiorari should accordingly be granted.

1. This is an action under Title VII, 42 U.S.C. 2000e *et seq.*, and the California Fair Employment and Housing Act (FEHA), California Government Code 12900 *et seq.* Respondents, twenty-three Latina and Southeast Asian women who are former employees of petitioner NIBCO, Inc., complain that a test administered by NIBCO had an unlawful disparate impact because it led to the disproportionate layoffs of Asian and Hispanic employees. Respondents do not allege that petitioner engaged in purposeful discrimination.

Respondents' complaint seeks backpay, reinstatement, frontpay for those not electing reinstatement, compensatory and punitive damages, injunctive and declaratory relief, and

attorneys' fees and costs. Because NIBCO no longer owns the facility, it is undisputed that reinstatement is not a possibility. NIBCO has denied the allegations of the complaint.

As it comes to this Court, the case concerns petitioner's rights to discovery on an issue that, per *Hoffman Plastic*, is critical to respondents' eligibility for these remedies: respondents' immigration status. Respondents sought a protective order precluding any pre-trial discovery into their immigration status and into whether they were lawfully working in the United States. They made their request under Fed. R. Civ. P. 26(c), which permits the entry of a protective order upon a showing of "good cause" that "justice requires [precluding discovery] to protect a party or person from annoyance, embarrassment, [or] oppression."

Petitioner opposed the motion on the ground that the discovery was highly relevant and that a protective order completely barring discovery – as opposed to prohibiting disclosure to non-parties – was unwarranted. Petitioner explained that, if respondents were not legally authorized to work in the United States, federal law would preclude them from receiving backpay. Relatedly, under the after-acquired evidence doctrine, respondents' right to reinstatement and frontpay would expire as of the date petitioner learned of their immigration status. In addition, settled California precedent precludes FEHA wrongful-termination claims by plaintiffs who were not legally authorized to work. *Murillo* v. *Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845 (1998); *Camp* v. *Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638-39 (1995).

The magistrate judge issued the requested protective order prohibiting discovery. Pet. App. 60a-69a. The magistrate notably did not take the narrower course of "limit[ing] disclosure of that information to the parties and their attorneys," as it had done with respect to other discovery. *Id.* 4a. The district court affirmed, *id.* 55a-59a, but certified its order for in-

terlocutory review (*id.* 70a-72a), and the court of appeals accepted the certification (*id.* 73a).

2. The Ninth Circuit affirmed. While expressing serious doubts that respondents' immigration status was relevant to their claims because the panel would limit *Hoffman Plastic* to its facts (Pet. App. 13a, 18a), the court decided the case on the assumption that the discovery was relevant (*id.* 18a). The court rested its decision on its conclusion as a matter of law – as opposed to the specific facts of this case – that discovery into immigration status would "chill" the prosecution of civil rights claims. Would-be plaintiffs, the court reasoned, would fear that the information would be used by immigration authorities to institute criminal prosecutions or deportation proceedings. *Id.* 8a. Such a prospect could "deter them, and future plaintiffs, from bringing meritorious claims." *Id.* 9a. Judge Reinhardt, in reasoning avowedly applicable to "every case involving national origin discrimination," maintained that the consequence would be that "countless acts of illegal and reprehensible conduct would go unreported." *Id.* 10a.

The panel found no offsetting interest in the discovery that would outweigh its supposed adverse effects on the vindication of civil rights claims. It reasoned that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." Pet. App. 17a-18a. Moreover, federal immigration policy would in any event preclude only the award of backpay, as opposed to the imposition of liability. *Id.* 18a-19a.

The panel conceded that the discovery "would aid [a civil rights] defendant in making pre-trial estimates of the damage award for which it might be responsible if found liable." Pet. App. 19a. But it deemed that fact "substantially outweighed by the harm the discovery would cause the plaintiffs." *Ibid.* "[L]iability must be determined in any event," the panel reasoned, because the plaintiffs could be entitled to an award of attorneys' fees. *Ibid.*

The panel also rejected petitioner's reliance on the after-acquired evidence doctrine, which – as this Court held in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) – cuts off a plaintiff's right to reinstatement or damages as of the date she would otherwise have been lawfully terminated by the employer. In this case, petitioner maintained that it would have been required by federal immigration law to terminate any of the respondents who were not authorized to work lawfully upon learning of that fact. But the court of appeals held that the "*McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions." Pet. App. 22a.

The panel also acknowledged California state court precedents precluding wrongful discharge claims by persons not authorized to work in this country. Pet. App. 24a. It reasoned that those decisions "may no longer be good law" in light of an intervening state statute. Although it acknowledged that the statute itself may be preempted by federal immigration laws, the panel concluded that all such questions could be avoided now because – as with respondents' Title VII disparate impact claims – the discovery sought supposedly went only to the question of damages, not liability. *Ibid.*

3. Petitioner's petition for rehearing and rehearing en banc was denied over an extensive dissent by four judges. Pet. App. 31a (Bea, J., joined by Kozinski, Kleinfeld, and Gould, JJ.). The dissenters explained that the panel's ruling both "profoundly subvert[s]" the federal discovery rules and "frustrates" federal immigration law. *Ibid.* The "hardship" supposedly justifying the protective order, the dissenters explained, was merely the prospect of "end[ing] plaintiffs' enjoying benefits to which they are not entitled under the law." *Id.* 35a. "The fact is that if plaintiffs do not have authorized immigration status, they are not entitled to be awarded back wages or wages they might have earned in the future from a job which they were incapable of holding, under our Immigration laws." *Id.* 32a. Moreover, the plaintiffs had produced "no *evidence* to substantiate its conclusion that anyone in this

lawsuit would be so 'chilled'" from litigating civil rights claims, but instead relied on an "*ipxe dixit* hunch." *Id.* 41a (emphasis in original).

The dissenters also highlighted the flaw in the panel's reliance on the fact that respondents' immigration status purportedly determines only the availability of certain remedies, rather than petitioner's liability. "[P]re-trial discovery has been recognized as an essential means for evaluation of damages, so that settlements can be achieved." Pet. App. 33a. In particular, under Fed. R. Civ. P. 68, defendants have the right "to make an offer of settlement by way of permission to take judgment in an amount, cutting off the plaintiffs' right to recover costs and attorneys' fees if the eventual award does not exceed the offer of judgment." *Id.* 34a n.2. But under the panel's holding, defendants "will have to prepare for trial or enter into settlement negotiations without essential proof to defend against the claims for wage loss, past and future, as well as foundational evidence (place of birth) for actuarial projections for the possible extent of non-economic damages (duration of emotional distress)." *Id.* 35a.

The dissenters also dismissed as unwarranted the panel's doubts that this Court's decision in *Hoffman Plastic* extends to Title VII claims. Of note, "the remedial language of [the NLRA and Title VII] is virtually identical." Pet. App. 51a. And "in holding that unauthorized aliens are not entitled to backpay under the NLRA, the Supreme Court [in *Hoffman Plastic*] reasoned that 'allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.' The same rationale applies here: allowing federal courts to award backpay to illegal aliens would also 'unduly trench upon' federal immigration policy as codified in the IRCA." *Id.* 53a.

The dissenters finally recognized that, however laudable the panel believed its goals, the courts "risk corrupting an admirable civil rights policy to prevent discrimination when

we rely on evasions to enforce it." Pet. App. 32a. "[T]here is simply is no principled reason for delaying frank investigation of the nature and extent of damages, unless it is a desire to advantage the plaintiffs, at least temporarily, and for the purposes of driving a higher settlement." *Id.* 33a. "[T]he panel accepts a gauzy and warm rationale for an evasion meant to impede the search for the truth. Such misguided compassion will surely corrupt the administration of our civil rights statutes, and threaten to bring them into public disrepute." *Id.* 54a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has held as a matter of law that plaintiffs are immune from pre-trial discovery of their immigration status notwithstanding that the requested discovery is directly relevant to the plaintiffs' claims. That holding merits review in this Court for two reasons. *First*, it is contrary to rulings of other federal courts that a party is not entitled to withhold relevant discovery when a more tailored protective order would resolve any legitimate concerns that the discovery would become public and when the discovery relates to the party's own *illegal* conduct. *Second*, to the extent that the court of appeals' decision rested on its strong suggestion that *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137 (2002), does not extend to Title VII disparate impact claims, that conclusion independently merits review in this Court, for if accepted it would thwart this Court's determination that the award of backpay to persons not authorized to work in this country substantially undermines federal immigration policy.

I. Certiorari Should Be Granted To Review The Ninth Circuit's Holding That Plaintiffs Are Entitled To Preclude Pre-Trial Discovery Into Their Immigration Status When That Status Is Relevant To Their Claims.

This Court should review the Ninth Circuit's holding that plaintiffs are entitled to a protective order immunizing them

from pre-trial discovery into their unlawful conduct when that discovery is highly relevant to their claims. That ruling runs contrary to basic principles of federal discovery long recognized by other courts of appeals. It furthermore seriously undercuts this Court's holding in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), that employers are not liable for backpay damages as of the date they discover facts – such as unlawful immigration status or other illegal activity – that would have led them to lawfully terminate the employee. The Ninth Circuit's decision deprives *McKennon* of most of its force in this context, given that (as other circuits have recognized) such after-acquired evidence is almost always secured *in discovery*.

1. The court of appeals did not find that the immigration status of a civil rights plaintiff is immune from discovery as "privileged." Rather, it identified an amorphous "privacy" interest in keeping that status a secret from the plaintiff's employer. Inescapably, the "embarrassment" respondents seek to avoid is nothing more than the exposure of illegal activity – for potential exposure of an employee's *lawful* immigration status would pose no risk of "chilling" respondents' assertion of their Title VII rights. Respondents claim a "privacy" right to hold, free from public scrutiny, jobs that they are legally prohibited from holding, and to live unlawfully in this country. In other contexts, this Court has repeatedly refused to recognize privacy interests in unlawful conduct (see, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984); *United States* v. *Place*, 462 U.S. 696, 707 (1983)), and it has recognized that the degree of privacy interference caused by requests for proof of valid immigration status – even when conducted by police at traffic checkpoints – is minimal (see *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

By nonetheless accepting respondents' asserted privacy interest, the Ninth Circuit's decision flouts the policy of liberal discovery of the Federal Rules of Civil Procedure. The general rule is that "[p]arties may obtain discovery regarding

any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). As this Court explained in *Hickman* v. *Taylor*,

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. * * * Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the *fullest possible knowledge of the issues and facts* before trial.

329 U.S. 495, 500-01 (1947) (emphasis added); see also *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957) (observing that the federal notice pleading system "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues"). Protective orders under Rule 26(c) must therefore be narrowly drawn and can only be issued for "good cause." "It is especially difficult to show grounds for ordering that discovery not be had when, as here, it is a deposition that is sought. Not only are protective orders prohibiting depositions rarely granted, but the plaintiff has a heavy burden of demonstrating the good cause for such an order." *SEC* v. *Dowdell*, 53 Fed. R. Serv. 3d (Callaghan) 1443 (E.D. Va. 2002) (citing 8 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2037 (2d ed. 1994)).

For this reason, even when there are valid reasons for fearing that information obtained during discovery will be misused, discovery on a given issue should not be *denied* when a more tailored protective order can be drawn to protect legitimate privacy concerns while permitting the parties to obtain the information necessary to litigate or settle the case. See, *e.g.*, *CSC Holdings* v. *Redisi*, 309 F.3d 988, 995-96 (CA7 2002) (reversing for abuse of discretion a district court's order barring discovery of evidence the district court feared might be used unlawfully, holding: "This concern may have been realistic, but there are mechanisms short of an outright denial of discovery to deal with it * * *. Each of these solutions would have made it possible for the Redisis to mount a defense; the outright denial of access * * * did not.").

Any legitimate interest that respondents may have had in avoiding the disclosure of their immigration status and thereby preventing embarrassment or exposure to prosecution or deportation could have been easily solved by a protective order barring petitioner from disseminating that information. See Fed. R. Civ. P. 26(c) (authorizing courts to fashion orders, including, *e.g.*, requirements that certain information obtained through discovery be placed under seal, to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-35 (1984) (upholding such a protective order against a First Amendment challenge, explaining that when liberal discovery "seriously implicate[s] privacy interests of litigants," protective orders against dissemination can prevent abuses while allowing discovery for the purpose of assisting in the preparation and trial, or the settlement, of litigated disputes). Indeed, this Court in *Seattle Times* explained that the fruits of discovery are traditionally, and still typically, not public; they are turned over to parties strictly for the purpose of litigation. 467 U.S. at 33 (holding that "pretrial depositions and interrogatories are not public components of a civil trial"); see also, *e.g.*, *Courier-Journal* v. *Marshall*, 828 F.2d 361, 367 (CA6 1987) (following *Seattle*

Times in upholding a protective order as an appropriate means of balancing the right of litigants to discovery, the privacy interests of those subject to discovery requests, and "the very limited right of access the press has to the presumptively non-public fruits of civil discovery"); *In re Grand Jury Subpoena (Under Seal)*, 836 F.2d 1468, 477 (CA4) (holding that "a district court has alternatives available to encourage parties to comply with the goal of liberal discovery short of entry of a protective order" barring discovery), cert. denied, 487 U.S. 1240 (1988); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 7-15, 37-39 (1983) (explaining that the privacy of discovery materials is ensured by routine litigation practice and, if necessary, by limited protective orders) (cited in *Seattle Times*, 467 U.S. at 33).

Because the district court did not bifurcate the trial proceedings into liability and damages phases, the panel's observation that petitioners' liability under Title VII does not turn on respondents' immigration status is – as Judge Bea's dissent from the denial of rehearing en banc notes – simply irrelevant. The proper remedy, including whether backpay can be awarded, *does* depend on respondents' immigration status, and unless proceedings are bifurcated, parties have a right to pretrial discovery on any issue relevant either to liability or to the remedy. See Pet. App. 33a (citing cases). Nor does the mere fact that some evidence is relevant only to remedy and not to liability mean that the district court should have exercised its discretion to bifurcate while denying pre-trial discovery. See, *e.g.*, *In re Selcraig*, 705 F.2d 789, 798 (CA5 1983) ("We do not think it appropriate to require that the trial procedure be altered, simply to protect [a witness's] privilege. Bifurcating the trial would either require the damage case to be presented without adequate pretrial discovery, or else would require a delay between the two trial stages.").

Nothing about the context of Title VII and immigration takes this case outside the settled rules governing discovery in the federal courts. To the contrary, this Court's decision in

Hoffman Plastic strongly supports petitioner's position. Whereas the Ninth Circuit deemed the discovery of respondents' immigration status to be contrary to federal law, *Hoffman Plastic* compels precisely the opposite conclusion: "[C]ombating the employment of illegal aliens" is "central to the policy of immigration law." 535 U.S. at 147. See *infra* Part II.

Allowing the courts to extend a discovery privilege in the context of Title VII litigation to facilitate concealment of the fact that a plaintiff is an illegal alien would thus "unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Hoffman Plastic*, 535 U.S. at 151. Shielding illegal aliens from discovery of their illegal status when they seek remedies to which they are not entitled or assert claims that may be barred because of that status "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." *Id.* at 151-52. However broad a court's authority may be to fashion protective orders, it is not so broad as to establish a discovery privilege designed to shield illegal aliens from discovery of their illegal status when it is so clearly relevant to the issues that their own lawsuit places in controversy.

2. Certiorari is equally warranted because the Ninth Circuit's decision in this case leaves this Court's decision in *McKennon* essentially an empty shell. According to the court of appeals, respondents were entitled to an order precluding the discovery of evidence highly relevant to the after-acquired evidence doctrine because the "*McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions." Pet. App. 22a. That ruling contravenes the most basic principles of federal discovery: the doctrine renders respondents' immigration status highly relevant to petitioner's liability, and hence discoverable. In fact, the evidence at issue in *McKennon* was itself acquired during the course of the plaintiff's deposition. 513 U.S. 352, 355 (1995) (emphasis added).

Other courts reject the Ninth Circuit's invitation to circumvent the after-acquired evidence doctrine recognized by this Court in *McKennon*. As the Seventh Circuit has recognized, the employer secures such evidence "typically in discovery." *Sheehan* v. *Donlen Corp.*, 173 F.3d 1039, 1047 (1999). See also, *e.g.*, *Mardell* v. *Harleysville Life Ins. Co.*, 31 F.3d 1221, 1222 (CA3 1994) (evidence is uncovered "typically" in "subsequent legal proceedings"), after remand, 65 F.3d 1072 (CA3 1995). And the courts have not hesitated to permit discovery to identify evidence relevant to the after-acquired evidence defense. *E.g.*, *Mardell*, 65 F.3d at 1073 n.2 (under *McKennon*, district court "would be well advised to permit further discovery" going to after-acquired evidence). District courts regularly address legitimate privacy concerns arising from the discovery of after-acquired evidence not by precluding discovery altogether, but instead through the use of protective orders "restricting defendants' use and disclosure of the" information. *E.g.*, *Davenport* v. *Indiana Masonic Home Found.*, No. IP 00-1047-C H/G, 2003 U.S. Dist. LEXIS 6350, at *9 (S.D. Ind. Mar. 27, 2003).

3. It is no answer that the district court – having thus far declined to bifurcate the liability and remedies phases of the proceedings and permit post-trial discovery into respondents' immigration status – could reverse itself. That option has already been put before the district court, which has not adopted it. Equally important, that prospect shows the illogic of the Ninth Circuit's decision: if a district court were to bifurcate proceedings and permit the requested discovery post-trial, the information would be provided to the employer. Any collateral consequence of dissuading illegal aliens from bringing suit under such a regime would be *no different* than if the discovery were provided at the outset, as the Rules of Civil Procedure contemplate. Put another way, there is no logical justification for ruling that the discovery of plaintiffs' immigration status should be *permitted* eventually but *deferred* until post-trial. The only consequence of such a ruling

is to disadvantage employer-defendants in the meantime and, as a result, encourage violations of the immigration laws.

The adverse effects upon employers and the litigation process generally are plain. Defendants are unable effectively to depose or cross-examine plaintiffs' expert economist regarding the accuracy of damage calculations and the underlying assumptions regarding mitigation efforts. Defendants' expert are unable to arrive at accurate valuations of plaintiffs' damages because of missing information regarding mitigation. As the en banc dissenters noted, under Fed. R. Civ. P. 68, defendants are unable to exercise their right to make an offer of settlement that eliminates their exposure to attorneys' fees. The ruling in this case makes such an offer impossible as a practical matter.

Beyond the issue of damages, most objectionable is that plaintiffs are able to place before the jury claims for which they have no legal support and for damages to which they are not entitled. The "spillover" prejudicial affect of unfounded Title VII backpay claims being presented to the jury is that plaintiffs could utilize such claims to support their allegations of emotional distress and/or as a basis for calculating punitive damages under state law. Moreover, in this case, the post-trial process disregards NIBCO's right to litigate its legal theory that plaintiffs' state-law claims are completely barred.

Finally, respondents' immigration status is relevant to whether they can state a claim – not merely secure damages – on their state-law theories as well. California case law precludes FEHA wrongful-termination claims by plaintiffs who were not legally authorized to work. *Murillo* v. *Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845 (1998); *Camp* v. *Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638-39 (1995). (The Ninth Circuit suggested that these decisions

may have been superseded by statute, but did not so hold (Pet. App. 24a), and no California case takes that view.) [1]

II. Certiorari Should Be Granted To Decide Whether This Court's Decision In *Hoffman Plastic* Extends To Disparate Impact Claims Under Title VII.

This Court held in *Hoffman Plastic* – a case under the NLRA – that the federal Immigration Reform and Control Act of 1986 precludes a backpay award to a person not authorized to work in this country. Although the Ninth Circuit in this case did not definitively decide whether *Hoffman Plastic* extends to claims under Title VII, it strongly so implied in a lengthy dictum obviously intended to persuade other courts to limit *Hoffman Plastic* to its facts. See Pet. App. 12a-18a. By granting certiorari, this Court would ensure conformity with its precedent and would have the opportunity to resolve the continuing uncertainty regarding the reach of *Hoffman Plastic*.

1. The employer in *Hoffman Plastic* unlawfully laid off four employees in response to their support of a union-organizing campaign. In administrative proceedings, the employer was able to discover that one employee was not authorized to work in this country; he had used a friend's birth certificate to obtain a California driver's license and a Social Security card and then used those documents to obtain employment with Hoffman. 535 U.S. at 141. The NLRB held that the employee was nonetheless entitled to backpay, reasoning that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."

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[1] The fact that a defendant may ultimately prevail on the merits of the case is thus no answer to the serious prejudice it will suffer during the trial and to the effect of the court of appeals' holding on undermining Congress's goal of encouraging settlements.

Ibid. (quoting 326 N.L.R.B. 1060). The D.C. Circuit affirmed. 208 F.3d 229 (2000).

This Court reversed, explaining that precedent imposed an "express limitation of backpay to aliens 'lawfully entitled to be present and employed in the United States.'" 535 U.S. at 146 (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 903 (1984)). Even more significant, "IRCA 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'" *Id.* at 147. The statute established a reticulated regime that is designed to limit employment to those persons lawfully entitled to work in this country and that requires an employer "to discharge the worker upon discovery of the worker's undocumented status." *Id.* at 148. "Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Ibid.* "Indeed, awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

Hoffman Plastic establishes that, if any of respondents are undocumented aliens, they are not entitled to the backpay relief sought by their complaint. It follows, *a fortiori*, that respondents' immigration status is relevant to their claim and discoverable. And the rationale of *Hoffman Plastic* supports the conclusion that the failure to provide discovery of plaintiffs' immigration status runs directly contrary to federal immigration policy as codified in IRCA. See *supra* Part I.

2. There is no merit to the Ninth Circuit's lengthy suggestion (Pet. App. 13a-18a) that *Hoffman Plastic* does not apply in civil rights cases. Precisely the same legal regime that required the employer in *Hoffman Plastic* to inquire into the immigration status of its employees and to discharge an undocumented worker applies here. There is accordingly no serious suggestion that an award of backpay under Title VII would any less undermine federal immigration policy and

"encourage[] future violations" (*Hoffman Plastic*, 535 U.S. at 150) than an equivalent award under the NLRA.

The distinctions perceived by the court of appeals between the statutory schemes are immaterial. Title VII's "backpay provision was *expressly modeled* on the backpay provision of the National Labor Relations Act." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 (1975) (emphasis added). This Court in *Hoffman Plastic* moreover relied on the fact that an NLRA claimant has an obligation to mitigate his damages but undocumented aliens are precluded from doing so as a matter of law "without triggering new IRCA violations." 535 U.S. at 150. Title VII plaintiffs have the same duty to mitigate. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 231 (1982).

To be sure, as the panel noted, private parties often enforce Title VII, while the NLRB enforces the NLRA. Pet. App. 13a-14a. But as the en banc dissenters explained, "the question here is not *who* can vindicate the rights, but *what damages* can be recovered. As to backpay and frontpay, both the NLRA and Title VII provide them as remedies. The two enactments are not broader or narrower as to this remedy." *Id.* 50a-51a (emphases in original).

The panel also noted that Title VII authorizes greater remedies than does the NLRA. Pet. App. 14a-15a. But the en banc dissenters correctly responded that "[t]he question is not *whether* unauthorized aliens are entitled to compensatory and punitive damages – they are – but *what is the scope of* the compensatory damages available under the two statutes. Courts have recognized that the remedial language of the two statutes is virtually identical." *Id.* 51a (emphases in original).

Finally, the court of appeals erred in contending that the public interest furthered by Title VII outweighs Congress's goals in the immigration laws. Although the public policy concerns advanced by Title VII are indisputably significant, the same is clearly true of those advanced by the NLRA. Yet this Court rejected an indistinguishable argument in *Hoffman*

Plastic. And "[t]here is nothing in either the *Hoffman* opinion or caselaw to suggest that the policy concerns underlying Title VII trump the policy considerations of the IRCA." Pet. App. 53a.

Respondents moreover assert a *disparate impact* claim – that is, they do not contend that petitioner engaged in purposeful national origin discrimination. By contrast, in *Hoffman Plastic*, there was no dispute that the employer purposefully violated federal labor law. It therefore makes no sense to say that Congress regards the conduct of employers such as petitioner to be more objectionable than that of employers who violate the NLRA.

3. This Court's guidance is furthermore sorely needed because, although the court of appeals cited decisions allegedly agreeing with its view that *Hoffman Plastic* is limited to cases under the NLRA (Pet. App. 17a-18a n.12), other courts would reach the opposite result in this case. Petitioner clearly would have prevailed in the Fourth Circuit. In *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184 (1998), a broad majority of the en banc Fourth Circuit held that undocumented workers receive no protections under Title VII because, under IRCA, they cannot be deemed "qualified" employees for purposes of the statute.

In the proceedings below, petitioner has assumed *arguendo* that undocumented aliens are qualified (because the Ninth Circuit had so assumed, see *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 n.10 (1989)), but that does not change the fact that the Fourth Circuit would have rejected the reasoning of the panel below and would have reached a different result. In direct conflict with the Ninth Circuit's view that undocumented aliens must be permitted to pursue Title VII claims, the Fourth Circuit held that such a rule would contradict "Congress' unequivocal declaration that it is illegal to hire unauthorized aliens and its mandate that employers immediately discharge unauthorized aliens upon discovering their undocumented status." *Egbuna*, 153 F.3d at 188. In-

stead, the Ninth Circuit's decision echoes the view of the Fourth Circuit *dissenters* that precluding Title VII claims would "defeat[] Congress's desire to eradicate employment discrimination." *Ibid.*

Other decisions squarely conclude that *Hoffman Plastic* extends beyond the NLRA context. For example, in *Escobar* v. *Spartan Security Service*, 281 F. Supp. 2d 895 (S.D. Tex. 2003), a sexual harassment/retaliation case brought by a worker who was undocumented but subsequently obtained authorization to work in the U.S. prior to filing his lawsuit, the court held that *Hoffman Plastic* precludes recovery of backpay in a Title VII case.

In *Veliz* v. *Rental Service Corp.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003), the Court granted the defendant-manufacturer's motion for summary judgment with regard to a lost wages claim made by the estate of an undocumented alien in a products liability case. "Following *Hoffman*, this Court finds that it cannot condone an award of lost wages here. In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA."

Similarly, in *Hernandez-Cortez* v. *Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780 (D. Kan. Nov. 4, 2003), the court relied on *Hoffman Plastic* to hold that a plaintiff in a personal injury case cannot recover "lost income based on projected earnings in the United States" because he was an undocumented alien.

And in *Renteria* v. *Italia Foods, Inc.*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 25, 2003), the Court relied on *Hoffman Plastic* to hold that certain plaintiffs were precluded from recovering back- and frontpay for their FLSA retaliatory discharge claims because they were not legally authorized to work in the United States. The court noted that "[t]he policies that motivated the enactment of the IRCA are certainly subject to debate, but the IRCA is the law of the

land, and the Supreme Court has made it clear [in *Hoffman Plastic*] that awarding back pay to undocumented aliens contravenes the policies embodied in that law."

State courts have come to the same conclusion. Thus, in *Sanchez* v. *Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. App. 2003), appeal granted by 671 N.W.2d 874 (Mich. 2003), and dismissed, 684 N.W.2d 342 (2004), the court held that undocumented workers were ineligible to receive weekly wage-loss benefits under state workers' compensation laws in light of a state law ordering the suspension of benefits for an employee who was unable to perform work because he had committed a crime. Citing *Hoffman Plastic*, the court explained that "the highest court in the land speaks with authority when it comes to determining what is a federal crime and when a violation has occurred." Similarly, in *Crespo* v. *Evergo Corp.*, 841 A.2d 471 (N.J. Super. App. Div. 2004), the court relied on *Hoffman Plastic* and IRCA to dismiss a state-law complaint alleging discriminatory termination, while in *Majlinger* v. *Cassino Contracting Corp.*, 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003), the court granted the defendant summary judgment on the ground that an undocumented alien cannot recover lost earnings due to injury. The court explained: "Although New York law has, in the past, permitted the recovery of lost wages for undocumented illegal aliens, the interpretation afforded to the Immigration Reform and Control Act (IRCA) by the United States Supreme Court in *Hoffman* would appear to require this court to conclude that the plaintiff should not be permitted to recover for lost wages given his inability to prove he is legally authorized to work in this country."

Certiorari should accordingly be granted in order to bring uniformity to federal law on this important and recurring question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 27, 2004

MARTHA RIVERA; MAO HER; ALICIA ALVAREZ; EVA ARIOLA; PEUANG BOUNNHONG; ROSA CEJA; CHHOM CHAN; BEE LEE; PAULA MARTINEZ; MARIA DOMITILIA MEDINA; MAI MEEMOUA; MARGARITA MENDOZA; BAO NHIA MOUA; ISIDRA MURILLO; MARIA NAVARRO; VATH RATTANATAY; OFELIA RIVERA; SARA RIVERA; MARIA RODRIGUEZ; MARIA RUIZ; MARIA VALDIVIA; SY VANG; YOUA XIONG; SEE YANG; XHUE YANG, Plaintiffs-Appellees,

v.

NIBCO, INC., an Indiana corporation, Defendant-Appellant.

No. 02-16532

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted
July 16, 2003 – San Francisco, California

Filed April 13, 2004

Before: Stephen Reinhardt, Eugene E. Siler, Jr.,* and Michael Daly Hawkins, Circuit Judges

*Honorable Eugene E. Siler, Jr., Senior Judge for the United States Circuit Court of Appeals for the Sixth Circuit, sitting by designation.

COUNSEL: Sara Hedgpeth-Harris, Sagaser, Franson & Jones, Fresno, California, for the appellant.

Christopher Ho, The Legal Aid Society--Employment Law Center, San Francisco, California, for the appellees.

Rebecca Smith, The National Employment Law Project, Olympia, Washington, for amici curiae The National Employment Law Project, Mexican American Legal Defense and Educational Fund, American Federation of State, County and Municipal Employees, Asian American Legal Defense and Education Fund, Asian Pacific American Legal Center, Coalition for the Humane Immigrant Rights of Los Angeles, Equal Rights Advocates, New York Immigration Coalition, Immigrant Rights Network of Iowa-Nebraska, National Council of Law Raza, National Interfaith Committee for Worker Justice, Puerto Rican Legal Defense and Education Fund, Pineros Y Campesinos Unidos del Noreste, and Sweatshop Watch.

Brendan D. Cummins, Minneapolis, Minnesota, for amici curiae The National Employment Lawyers Association, California Women's Law Center, and The National Partnership for Women and Families.

OPINION

REINHARDT, Circuit Judge:

Defendant NIBCO has brought this interlocutory appeal to challenge the validity of a protective order, fashioned by a federal magistrate and affirmed by the district court. The order prohibits NIBCO from using the discovery process to inquire into the plaintiffs' immigration status and eligibility for employment. Because NIBCO has failed to demonstrate that the protective order was either clearly erroneous or

contrary to law, we affirm the district court's decision denying reconsideration of the order.

I. Factual and Procedural Background

The plaintiffs in this dispute are twenty-three Latina and Southeast Asian female immigrants once employed as production workers at NIBCO's factory in Fresno, California.[1] All of the plaintiffs are of limited English proficiency, yet all allegedly performed their respective duties successfully during their tenure with NIBCO. Although the plaintiffs' job descriptions did not require English proficiency, sometime in 1997 or 1998, NIBCO required them to take basic job skills examinations given only in English. The plaintiffs performed poorly on the exams. NIBCO allegedly responded with a range of adverse employment consequences. Some plaintiffs were demoted or transferred to undesirable job assignments; eventually, all plaintiffs were terminated in the period between July 30, 1998 and September 24, 1998.

The plaintiffs requested and received right-to-sue letters from the EEOC and California's Department of Fair Employment and Housing ("DFEH"). Subsequently, the plaintiffs filed an action in federal court, alleging disparate impact discrimination based on national origin in violation of Title VII, 42 U.S.C. § 2000e et seq., and the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940, *et seq*. The plaintiffs sought reinstatement (and front pay for those not electing reinstatement), backpay, compensatory and punitive damages, and attorneys fees, as well as injunctive relief enjoining NIBCO from, *inter alia*, continuing its English-language testing policy, and

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[1] The suit was originally brought by twenty-five named plaintiffs as representatives of a similarly situated class. Plaintiffs voluntarily dismissed all class action portions of the complaint. On September 18, 2002, plaintiffs Rosa Ceja and Xhue Yang voluntarily dismissed their claims, leaving twenty-three remaining plaintiffs.

compelling it to expunge any record of wrongdoing from personnel files.

This interlocutory appeal arises out of a discovery dispute in the above action. During the deposition of plaintiff Martha Rivera, NIBCO asked where she was married and where she was born. Although Rivera had specified that she was of "Mexican ancestry" in her answers to interrogatories, Rivera's counsel instructed her not to answer any further questions pertaining to her immigration status. The plaintiffs thereafter terminated the deposition. The plaintiffs then filed for a protective order against further questions pertaining to immigration status. Their request was predicated on the claim that – because each plaintiff had already been verified for employment at the time of hiring and because further questions pertaining to immigration status were not relevant to their claims – additional questioning would have a chilling effect on their pursuit of their workplace rights.

The magistrate judge presiding over discovery issued a protective order. The order granted the plaintiffs some discovery protection for three types of questions NIBCO sought to ask. With respect to questions relating to the plaintiffs' places of birth, the magistrate judge found that "there appears to be no dispute that each plaintiff is a member of a protected class, and [thus that] further questions regarding where each plaintiff was born has no further relevance to this action."[2] *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647, 649 (E.D. Cal. 2001). The magistrate judge did, however, allow NIBCO discovery concerning the plaintiffs' places of marriage, educational background, current and past employment, damages, date of birth, and criminal convictions, but limited disclosure of that information to the parties and their attorneys. *Id.* at 649. With regard to each plaintiff's immigration status, the magistrate judge barred all

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[2] Both parties stipulated to the national origin designation of each plaintiff as contained in NIBCO's representations to the EEOC.

discovery into the matter, but did not preclude NIBCO from conducting its own independent investigation. She acknowledged that the "after-acquired" evidence doctrine could limit NIBCO's liability in the event that it discovered that some plaintiffs were not eligible for employment, but ruled that NIBCO under the circumstances did not have a right to use the discovery process to gain that information. *Id.* at 649-51 (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-63, (1995)). Allowing NIBCO to obtain such information through the discovery process, she found, would unnecessarily chill legitimate claims of undocumented workers under Title VII.

NIBCO filed a motion under FED. R. CIV. P. 72(a), requesting that the district court reconsider the magistrate's ruling. The court denied the motion. *Rivera v. NIBCO, Inc.*, 2001 WL 1688880 (E.D. Cal. Dec. 21, 2001). It found that the defendant's various contentions misstated the magistrate's ruling, and held that it was neither clearly erroneous nor contrary to law. *Id.*

NIBCO subsequently filed a motion to certify the discovery ruling for interlocutory appeal. Before the district judge ruled on the motion, however, the United States Supreme Court issued its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) [hereinafter *Hoffman*]. *Hoffman* held that the National Labor Relations Board lacks the discretion to award backpay to undocumented workers seeking relief for an employer's unlawful employment practices under the National Labor Relations Act. 535 U.S. at 151-52. NIBCO immediately filed a second motion to reconsider, claiming that after *Hoffman*, each plaintiff's immigration status was discoverable because of its direct relevance to potential remedies. In response, the plaintiffs proposed a proceeding bifurcated into liability and damages phases. Under the plaintiffs' proposal, the case would proceed to trial on liability first. If the plaintiffs were able to prove NIBCO's liability for the alleged disparate impact violation, the court would then hold an *in camera*

proceeding designed to preserve the plaintiffs' anonymity, protect their statutory rights, and avoid prejudicing the defense. The proceeding would allow each plaintiff to testify regarding her immigration status, provide documents supporting her entitlement to backpay, and provide a formal certification from the Social Security Administration attesting that she was authorized to work throughout the backpay period. The judge would make deductions from the aggregate award backpay for any plaintiff who failed to prove eligibility. Once the aggregate award was thus reduced to encompass only eligible plaintiffs, plaintiffs' counsel would then have the responsibility of giving each eligible plaintiff her share of the total.

The district court postponed its decision on whether to bifurcate the trial, denied NIBCO's request to reconsider, and granted NIBCO's motion to certify the post-*Hoffman* order denying reconsideration of the interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We granted the petition for interlocutory appeal.

II. Standard and Scope of Review

District courts review magistrate judges' pretrial orders under a "clearly erroneous or contrary to law" standard. FED. R. CIV. P. 72(a). This court reviews "a district court's denial of a motion to reconsider a magistrate's pretrial [protective discovery] order under that same standard." *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002). We may not overturn a protective order simply because we might have weighed differently the various interests and equities; instead, we must ascertain whether the order was contrary to law.[3]

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[3] When a protective order is overbroad, we may consider the principles militating in favor of and against discovery, and remand with instructions to guide the district court in modifying the protective order. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1139-41 (9th Cir. 2003) (considering the relevant principles and remanding with guiding instructions).

We have jurisdiction to consider orders certified for interlocutory appeal under 28 U.S.C. § 1292(b). Our scope of review is broader than the specific issues the district court has designated for appellate review. "The appellate court may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE ¶ 110.25[1], at 300 (2d ed.1995)). *See also id.* ("'The court of appeals may review the entire order, either to consider a question different than the one certified as controlling or to decide the case despite the lack of any identified controlling question.'") (quoting 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3929, at 144-145 (1977)); *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002). In this case, the order certified is the district court's post-*Hoffman* order denying reconsideration of the protective order granted by the magistrate judge. We now turn to whether the district court was required by law to overturn or modify the protective order.

III. Discussion

The magistrate judge granted the protective order at issue pursuant to FED. R. CIV. P. 26. Rule 26 states that, in general, any matter relevant to a claim or defense is discoverable. FED. R. CIV. P. 26(b). That principle is subject to limitation. After a showing of good cause, the district court may issue any protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including any order prohibiting the requested discovery altogether, limiting the scope of the discovery, or fixing the terms of disclosure. Fed. R. Civ. P. 26(c). The burden is upon the party seeking the order to "show good cause" by demonstrating harm or prejudice that will result from the discovery. *See Phillips ex*

rel. Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1210-11 (9th Cir. 2002). "If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." *Id.* at 1211. In this case, the protective order was justified because the substantial and particularized harm of the discovery – the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights[4] – outweighed NIBCO's interests in obtaining the information at this early stage in the litigation. We therefore hold that the district court's decision not to disturb the order was neither clearly erroneous nor contrary to law.

A. The Harm of Disclosure

The protective order at issue bars discovery into each plaintiff's immigration status on the basis that allowing NIBCO to use the discovery process to obtain such information would chill the plaintiffs' willingness and ability to bring civil rights claims. *Rivera*, 204 F.R.D. at 651. By revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation. Although NIBCO has promised not to disclose

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[4] NIBCO has conceded for the purposes of these proceedings that Title VII applies to discrimination against undocumented aliens on one of the protected grounds: race, sex, national origin, etc. *Rivera*, 204 F.R.D. at 649. The parties' stipulation is consistent with what we have long assumed to be the law of this circuit. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.10 (9th Cir. 1989) (assuming without deciding that undocumented workers are entitled to the protections of Title VII), overruled on other grounds by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 590 (E.D. Cal. 1991) (holding that "the protections of Title VII were intended by Congress to run to aliens, whether documented or not, who are employed within the United States").

the plaintiffs' immigration status to any outside party, the district court found that requiring the plaintiffs to answer such questions in the discovery process would likely deter them, and future plaintiffs, from bringing meritorious claims.

We agree with the district court. There are reportedly over 5.3 million workers in the "unauthorized labor" force. *See* Dean E. Murphy, *A New Order: Imagining Life Without Illegal Immigrants*, N.Y. TIMES, Jan. 11, 2004, § 4, at 1. Many of these workers are willing to work for substandard wages in our economy's most undesirable jobs. While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution. *See* Br. of Amicus Curiae of National Employment Law Project, et al., 4-12. The caselaw substantiates these fears. *E.g.*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886-87 (1984) (employer reported five undocumented workers after they voted in favor of union representation); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1062-63 (9th Cir. 2000) (court allowed the plaintiffs to plead their claims anonymously due to their fear of retaliatory deportation); *Fuentes v. INS*, 765 F.2d 886, 887 (9th Cir. 1985) (employer reported undocumented workers he had employed for three years for less than minimum wage when they filed suit to recover wages owed), *vacated by Fuentes v. INS*, 844 F.2d 699 (9th Cir. 1988); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (employer recruited an undocumented worker and then reported him to the INS after he filed an FLSA claim for unpaid wages); *Contreras v. Corinthian Vigor Ins. Brokerage*, Inc., 25 F. Supp. 2d 1053, 1055 (N.D. Cal. 1998) (employer reported an undocumented worker after she filed a FLSA claim for unpaid wages).

As a result, most undocumented workers are reluctant to report abusive or discriminatory employment practices. *See*

United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) ("The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation."); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676-79 (2003) (arguing that undocumented workers are reluctant to report a variety of labor and employment law violations). Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.[5]

Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or

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[5] The fact that NIBCO has pledged not to use the plaintiffs' immigration status to retaliate against them does not eliminate the substantial risk of chilling the rights of these and future plaintiffs. First, to overturn the magistrate judge's protective order in this case might effectively grant all future employers the right to discover the immigration status of any of their employees who choose to assert a Title VII national origin claim. Second, courts often fashion protective orders designed to protect against anticipated retaliation. In this circuit, for instance, we have held that the existence of post hoc legal remedies for retaliation do not necessarily provide adequate protection when plaintiffs anticipate retaliation that would result in extraordinarily burdensome consequences. *See Advanced Textile Corp.*, 214 F.3d at 1071-72 (noting that "complaining employees are more effectively protected from retaliation by concealing their identities" than by relying on legal anti-retaliation remedies).

friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.

The chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest. The Supreme Court has recognized that Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII.[6] *See N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (finding that "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority'"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("the private right of action remains an essential means of obtaining judicial enforcement of Title VII. . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."); *see also* H.R. REP. NO. 102-40, pt. 2, at 34 (1991) (report of the committee on the judiciary describing how the failure to adequately compensate plaintiffs has a chilling effect on the 'private attorneys general' policy of the civil rights laws).[7] Given Title VII's dependence on private enforcement, we find that the national effort to eradicate discrimination in the workplace would be hampered by the discovery practices NIBCO seeks to validate here. We therefore conclude that discovery of each plaintiff's immigration status constitutes a

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[6] Title VII even allows the court, in some circumstances, to appoint counsel for the complainant. 42 U.S.C. § 2000a-3(a).

[7] FEHA also depends on private enforcement to effectuate its goals. *See Flannery v. Prentice*, 26 Cal.4th 572, 582-83, 110 Cal. Rptr. 2d 809, 28 P.3d 860 (2001) (construing attorneys fees provisions to ensure proper incentives for private enforcement of FEHA).

substantial burden, both on the plaintiffs themselves and on the public interest in enforcing Title VII and FEHA.

B. Balancing of Interests

Even if the discovery would burden plaintiffs and others with an interest in enforcing Title VII and FEHA, the burden must be "undue" in order to justify the protective order. *See* FED. R. CIV. P. 26(c). We thus must examine NIBCO's various interests in discovering the immigration status information. NIBCO asserts that because each plaintiff's immigration status governs her entitlement to reinstatement, front pay, and back pay on Title VII claim, and governs any recovery on her FEHA claim, it must be permitted to discover this information. We consider NIBCO's contentions below.

1. The Relevance of *Hoffman Plastic*

NIBCO's principal argument is that the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), forecloses any award of backpay to an undocumented plaintiff and therefore discovery of documented or undocumented status is essential to its defense.[8] We disagree.

In *Hoffman*, the Supreme Court reviewed an award of backpay to illegal immigrants who, in violation of § 8(a)(3) of the National Labor Relations Act ("NLRA"), were terminated because of their participation in the organization of a union. 535 U.S. at 140-41. The National Labor Relations Board ("NLRB") based its decision to award backpay on its previous holding that the NLRA's protections applied to documented and undocumented workers alike. *Id.* at 141. The

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[8] After *Hoffman* was decided, the plaintiffs agreed that if their proposed *in camera* procedures were adopted, they would not seek backpay for undocumented aliens. Following the issuance of the protective order that is the subject of this interlocutory appeal, the district court considered, but did not rule on, the proposed procedures, including bifurcation of the trial into liability and remedies phases.

Supreme Court reversed the Board's order. The precise question before the Court was whether the NLRB had the authority under the NLRA to award backpay to undocumented workers notwithstanding the prohibition on hiring such workers in the Immigration Reform and Control Act of 1986 ("IRCA"). Answering that question in the negative, the majority also strongly suggested that the policy goals of IRCA outweigh those of the NLRA, and therefore that IRCA would preclude any backpay award to illegal immigrants under the NLRA. 535 U.S. at 148-52.

NIBCO would have us go further and hold that: (a) *Hoffman* precludes any award of backpay to an illegal immigrant, no matter what federal statute the employer may have violated; and (b) the district court is *required* to grant the request for pre-trial discovery of the plaintiffs' immigration status.

We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases. The NLRA and Title VII are different statutes in numerous respects. Congress gave them distinct remedial schemes and vested their enforcement agencies with different powers. For purposes of this opinion, we note at least three significant differences between the two statutes.

First, the NLRA authorizes only certain limited private causes of action, while Title VII depends principally upon private causes of action for enforcement. The NLRA is enforced primarily through actions of the NLRB – private actions are available only in exceptional circumstances. *See NLRB v. United Food & Commercial Workers Union, Local 23, AFLCIO*, 484 U.S. 112, 118-19 (1987); *Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536-37 (1989) (recognizing the exceptional actions for breaches of the duty of fair representation and actions to enforce collective bargaining agreements under § 301); *Bd. of*

Trade v. SEC, 883 F.2d 525, 530 (7th Cir. 1989).[9] Title VII, by contrast, depends almost entirely upon individual workers – private attorneys general – to achieve the deterrent purposes of the statute. *See N.Y. Gaslight Club*, 447 U.S. at 63 (finding that "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority'"); *Alexander*, 415 U.S. at 45 (holding that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII" and noting that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices").

Second, Congress has armed Title VII plaintiffs with remedies designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers. Title VII's enforcement regime includes not only traditional remedies for employment law violations, such as backpay, frontpay, and reinstatement, but also full compensatory and punitive damages. 42 U.S.C. § 1981a; *see also Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 851-52 (2001). Congress added the latter types of damages to Title VII in 1991 in order to facilitate the deterrence of discrimination. *See* Civil Rights Act of 1991, § 3, 102 Pub. L. 166; 105 Stat. 1071, 1071 ("The Congress finds that . . . additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."); *see also Pollard*, 532 U.S. at 852. This full complement of remedies accords with the long-standing notion that Title VII requires courts to remedy instances of discrimination by sending strong messages to

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[9] This may explain why the *Hoffman* Court found that the NLRA's "traditional remedies," such as cease and desist orders and contempt proceedings, were "sufficient to effectuate national labor policy regardless of whether" backpay was available. 535 U.S. at 152.

would-be-discriminators. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (holding that, in order to achieve "complete justice," district courts have the obligation to "render a decree which will so far as possible eliminate the discriminatory effects of the past as well as *bar like discrimination in the future*") (emphasis added) (quotation omitted).

Third, under the NLRA, the NLRB may award backpay to workers when it has found that an employer has violated the Act. Under Title VII, a federal court decides whether a statutory violation warrants a backpay award.[10] This difference is significant given that *Hoffman* held that the NLRB possesses only the discretion to "select and fashion remedies for violations of the NLRA," and that this discretion, "though broad, is not unlimited." 535 U.S. at 142-43 (citations omitted). The Court held that, given the strong policies underlying IRCA and the Board's limited power to construe statutes outside of its authority, the NLRB's construction of the NLRA was impermissible.[11] This

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[10] This is not to say that the EEOC plays no role. To the contrary, Title VII depends upon both action by the EEOC and private enforcement to achieve its goals. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002). Along these lines, the EEOC has been given broad authority not just to respond to individual instances of discrimination, but to investigate discrimination independently in an effort to eradicate it from the economy. *Cf. id.* at 296 n.11 (noting that "we have generally been reluctant to approve rules that may jeopardize the EEOC's ability to investigate and select cases from a broad sample of claims" because "'it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired'") (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984)).

[11] *See also Hoffman*, 535 U.S. at 149 (holding that "awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer," and therefore that "the award lies beyond the bounds of the Board's remedial discretion"); *id.* at 143 ("the Board has not been

limitation on the Board's authority says nothing regarding a *federal court's power* to balance IRCA against *Title VII* if the two statutes conflict. A district court has the very authority to interpret both Title VII and IRCA that the NLRB lacks. Thus, to the extent that *Hoffman* stands for a limitation on the NLRB's remedial discretion to interpret statutes other than the NLRA, the decision appears not to be relevant to a Title VII action. *Cf. Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 757 (9th Cir. 1997) (holding that district courts have the authority to construe competing statutes even when the NLRB lacks it).

The differences between the two statutes persuade us that *Hoffman* does not resolve the question whether federal courts may award backpay to undocumented workers who have been discharged in violation of Title VII. Resolving the conflicting statutory policies involved in determining whether IRCA bars such awards to employees discriminated against on the basis of their national origin necessitates a different analysis than the Court undertook in *Hoffman*. As we have pointed out, in Title VII Congress has chosen to rely heavily on private actions that result in the imposition of severe remedies, including backpay, in order to deter future discrimination and vindicate national policy of the highest priority. It is far from evident to us that Congress intended to bar the use of one of the most critical of those remedies in the case of undocumented workers who are victims of invidious discrimination. In fact, given the importance of private actions to the enforcement scheme and of backpay to the

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commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives") (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); *id.* ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel") (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984)).

bringing of private actions, we are strongly inclined to believe that it did not. We are influenced in this view by the Court's statement in *Albemarle Paper*, 422 U.S. at 417-18, that it "is the reasonably certain prospect of a backpay award that provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history" (internal citation and quotation marks omitted). We are also influenced by our own court's conclusion that Title VII's "central statutory purpose" is "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *McLean v. Runyon*, 222 F.3d 1150, 1155 (9th Cir. 2000) (quoting *Albemarle Paper*, 422 U.S. at 421). Finally, we find it significant that the courts that have considered *Hoffman* in analogous cases have thus far found it to be inapplicable or distinguishable.[12] In sum, the overriding

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[12] *See Cano v. Mallory Mgmt.*, 195 Misc. 2d 666, 760 N.Y. S.2d 816, 818 (N.Y. Sup. Ct. 2003) (collecting cases and noting that "every case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly"); *see also De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (N.D. Ill. 2002) (reasoning that a federal district court's remedial power under Title VII differs from the NLRB's power under the NLRA, and thus that *Hoffman* was not "dispositive of the issues raised in the motion to compel" discovery of immigration status in a Title VII action); *cf. Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that *Hoffman* "did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes"); *Flores v. Albertsons, Inc.*, 2002 U.S. Dist. LEXIS 6171, 2002 WL 1163623, *5 (C.D. Cal. Apr. 9, 2002) (finding *Hoffman* inapplicable to an FLSA action); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464-65 (E.D. N.Y. 2002) (holding that *Hoffman* does not bar backpay under the FLSA and granting a protective order barring discovery into the plaintiff's immigration status); *Zeng Liu v.*

national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases. Thus, we seriously doubt that *Hoffman* applies in such actions.

We need not decide the *Hoffman* question in this case, however. Regardless whether *Hoffman* applies in Title VII cases, it is clear that it does not *require* a district court to allow the discovery sought here. No backpay award has been authorized in this litigation. Indeed, the plaintiffs have proposed several options for ensuring that, whether or not *Hoffman* applies, no award of backpay is given to any undocumented alien in this proceeding. Thus, the very problem NIBCO has identified may well never arise here.

Perhaps even more important, we have long recognized "the distinction between a violation [of Title VII] and the availability of remedies." *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997). The fact that a particular defendant's violation of Title VII might be "inconsequential," because the plaintiff in question is not eligible for certain forms of relief, merely "goes to the issue of damages, not liability." *Id.* The information that NIBCO seeks is not relevant to determining whether it has violated Title VII. *See id.* (quoting *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981) ("The questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination – ether based on race or some other factor such as a motive of reprisal – a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of [remedies].") (alterations from *Hashimoto*)). We recognize

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Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D. N.Y. 2002) (questioning the applicability of *Hoffman* to the FLSA and denying the defendant's request to discover the plaintiff's immigration status due to the danger of "intimidation, the danger of destroying the cause of action, [and the risk that the discovery would] inhibit plaintiffs in pursuing their rights" (internal quotation marks omitted)).

that discovering the various plaintiffs' eligibility for particular remedies would aid the defendant in making pre-trial estimates of the damage award for which it might be responsible if found liable. The convenience to NIBCO, however, is substantially outweighed by the harm the discovery would cause the plaintiffs. *See supra* at 4824-25. Moreover, other remedies clearly remain available and liability must be determined in any event. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 112-14 (1992) (holding that even an award of nominal damages is sufficient to allow an award of attorney's fees); *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 993 (9th Cir. 1992) (holding that a Title VII plaintiff may recover attorney's fees despite not recovering monetary damages when he has prevailed in his request for injunctive relief), *cert. denied*, 507 U.S. 910 (1993).

The district court has not yet ruled on the plaintiffs' proposed bifurcated proceedings. Although we do not order such proceedings here, it is clear that a separation between liability and damages would be consistent with our prior case law and would satisfy the concern that causes of action under Title VII not be dismissed, or lost through intimidation, on account of the existence of particular remedies. The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief. NIBCO's contention that discovery regarding the plaintiffs' immigration status is essential to its defense is therefore without merit.[13] Accordingly, we hold that the district court did not err when it declined to modify the protective order.

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[13] The EEOC has agreed with our conclusion in its Enforcement Guidelines. The Commission has found that

> The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as

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2. The After-Acquired Evidence Doctrine

NIBCO argues that the "after-acquired evidence" doctrine requires the district court to approve its discovery request.[14] The "after-acquired evidence" doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later "discovers" evidence of wrongdoing that would have led to the employee's termination had the employer known of the misconduct. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-63 (1995). As we have explained, "an employer can avoid backpay and other remedies by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence that it would have fired the employee for that misconduct." *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996).

> illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work. When enforcing these laws, EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge.

Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2003), *available at* http://www.eeoc.gov/policy/docs/undoc-rescind.html.

[14] To the extent that NIBCO's argument relates to the availability of frontpay and reinstatement, it has been rendered irrelevant as the successor employer is no longer a party to this dispute.

The *McKennon* Court, interpreting the ADEA,[15] balanced the public policy interest in eliminating unlawful discrimination against the equitable principle that an employer should not be held liable for damages when the employee invokes the aid of the court with unclean hands. *Id.* at 361. The Court concluded that, "as a general rule in cases [involving after-acquired evidence of wrongdoing], neither reinstatement nor front pay is an appropriate remedy." *Id.* at 361-62. Further, the Court held that "once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." *Id.* at 362.[16] Yet the after-acquired evidence doctrine's application depends upon context – "the proper boundaries of remedial relief must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case." *Id.* at 361.[17]

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[15] Although we have not yet applied the *McKennon* "after-acquired evidence" rule to Title VII, *McKennon* itself makes clear that the rule applies to both Title VII and the ADEA. *See McKennon*, 513 U.S. at 358 ("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'") (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). *See also O'Day*, 79 F.3d at 760-61 (discussing Title VII and the ADEA interchangeably).

[16] Therefore, the Court determined that backpay should be awarded only from the date of the unlawful discharge to the date the information is discovered. *Id.* Barring backpay entirely, the Court found, would undermine the objectives of the ADEA. 513 U.S. at 363.

[17] *See also id.* at 358 ("It would not accord with [the remedial scheme adopted by the federal civil rights laws] if after-acquired evidence of wrongdoing that would have resulted in termination

In this case, NIBCO has failed to come forward with any evidence that would justify limiting the plaintiffs' remedies. NIBCO claims, instead, that the court was required to facilitate its discovery of any such evidence by granting its requests to interrogate the former employees regarding their immigration status. We reject NIBCO's claim. *McKennon* does not direct courts to authorize the type of discovery NIBCO seeks to conduct here. Although *McKennon* involved illegal conduct that was "after-acquired" during a deposition, the *McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions. Even if we concluded that *McKennon authorizes* district courts to approve such discovery, that would be a far cry from holding that *McKennon requires* a district court to order plaintiffs to submit to intrusive and injurious investigations in order to pursue a civil rights action. Moreover, the *McKennon* Court insisted that the district courts would play a critical role in *preventing* defendants from using the after-acquired evidence doctrine as a sword rather than as a shield against inappropriate damage awards. "The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to . . . invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses." *Id.* at 363.

District courts need not condone the use of discovery to engage in "fishing expeditions." *See, e.g., Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1487 (5th Cir. 1995). Accordingly, *McKennon* authorizes district courts to invoke the Federal Rules of Civil Procedure when necessary to prevent employers from using the discovery process to engage in wholesale searches for evidence that might serve to limit its damages for its wrongful conduct. The

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operates, in every instance, to bar all relief for an earlier violation of the Act.") (emphasis added).

magistrate judge straightforwardly applied these principles in fashioning the protective order. Given the substantial risk of chilling the plaintiffs' rights, and the fact that all parties had already stipulated that the plaintiffs are members of a protected class under Title VII, the district court appropriately used Rule 26(c) to preclude discovery that might otherwise have allowed the employer to evade liability under Title VII.

Moreover, we note that before an employer may use "after-acquired evidence," it must meet its burden of showing that, had it been aware of that evidence, it would have forthwith discharged the employee. *See O'Day*, 79 F.3d at 758-59. Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain. We have placed the burden of proof squarely on employers who seek to assert an after-acquired evidence defense. *Id.* at 759 ("*McKennon* places the burden of proof with respect to this issue on the employer, carefully articulating that the employer must establish not only that it could have fired an employee for the later-discovered misconduct, but that it would in fact have done so."). Thus, in the immigration context, the employer must prove that it would actually have fired the employees had it known that they were undocumented. It does not appear that there is any evidence in the record, at this stage of the litigation, that would tend to satisfy NIBCO's burden that it would have done so. In this circumstance, a district court may well be reluctant to order discovery that would inquire into the immigrant's status, given the harm that such investigations cause. *See supra* at 4824-25.

We conclude that the after-acquired evidence doctrine did not require the district court to grant NIBCO's discovery request. Defendants may undoubtedly use the discovery

process to obtain "relevant" evidence. Yet district courts have the discretion to structure depositions and interrogatories in ways that balance the defendant's need to obtain evidence of possible misconduct relevant only to remedies with the burdens the plaintiffs would face if such discovery took place before trial. Here, the balance the court struck was well within its discretion.

3. Plaintiffs' FEHA Claim

There is an additional dispute concerning whether the plaintiffs' immigration status is relevant to their FEHA claims. NIBCO relies on two California cases that adopt the reasoning of *McKennon*: *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833 (1998) and *Camp v. Jeffer, Mangels, Butler, & Marmaro*, 35 Cal. App. 4th 620 (1995). The *Camp* decision stands for the proposition that an employee who illegally acquires a job may not recover on a claim for wrongful discharge. *See Camp*, 35 Cal. App. 4th at 639. *Murillo* upheld *Camp* as applied to an undocumented alien by ruling that, though an illegal alien cannot state a claim for wrongful discharge, he may recover for illegal harassment suffered *during* the employment. *See Murillo*, 65 Cal. App. 4th at 847-51.

Both of these decisions, however, predate the California legislature's response to *Hoffman*. In September 2002, just over five months after *Hoffman* was decided, California enacted a statute codifying identical provisions in three sections of its codes: "All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." CAL. CIV. CODE § 3339(a); CAL. GOV'T CODE § 7285(a); CAL. LAB. CODE § 1171.5(a). Thus, California appears to have provided for a wide range of monetary remedies including some that may not be available to

undocumented workers under Title VII; accordingly, *Camp* and *Murillo* may no longer be good law.

Were the district court to award backpay to plaintiffs found to be illegal immigrants, a conflict might arise between IRCA and California law. However, given our holding that the liability stage may go forward without deciding the question of what remedies are available, there is no need for us to engage in a preemption analysis now. Only in the event that the district court finds NIBCO liable and then decides, after considering its various factual and legal options, to award backpay to illegal immigrants will it become necessary for us to decide the preemption question. *See supra* note 8.

4. IRCA's Reverification Provision

Finally, both parties have advanced arguments about the relevance of IRCA to this dispute. The plaintiffs have argued that IRCA prohibits the requested discovery; NIBCO maintains that, after *Hoffman*, IRCA prohibits the protective order. We have discussed NIBCO's contention above. We now turn to the plaintiffs' contention and find it meritless.

The essence of the plaintiffs' argument is that NIBCO's discovery request violates IRCA's prohibition on "document reverification." *See* 8 U.S.C. § 1324b(a)(6). IRCA generally prohibits employers from requesting "more or different" documents than those specified in the statute when evaluating an individual's immigration status upon hiring, recruiting, or referring them for employment.[18] The Office of the Chief

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[18] 8 U.S.C. § 1324b(a)(6) states: "A person's or other entity's request, for the purposes of satisfying the requirements of section 1324a(b) of this title [concerning hiring, recruiting, or referring], for more or different documents than are required under [§ 1324a(b)] or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against any individual [other than an unprotected undocumented alien on the basis of national origin or citizenship status.]"

Administrative Hearing Officer ("OCAHO"), in the Executive Office for Immigration Review of the Justice Department, has interpreted the relevant provision to require plaintiffs to establish "(1) that the [defendant] is a person or other entity which makes a request; (2) for more or different documents than are required by the employment verification system; and (3) that the request was made for purposes of complying with the provisions of 8 U.S.C. § 1324a(b)." *United States v. Townsend Culinary*, 8 OCAHO 1032, 1999 WL 1295209, *33 (1999). This court also requires that the plaintiff prove that the employer had a discriminatory intent. *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 801-02 (9th Cir. 1998).

Nothing in the text, structure, or legislative history of IRCA suggests that the "reverification" provision regulates the discovery process. Rather, the provision concerns the documents that an employer may request when fulfilling its mandatory duty to investigate immigration status upon hiring, recruiting, or referring new employees. *See* 8 U.S.C. § § 1324a(b), 1324b(a)(6). What documents an employer may investigate in the context of a lawsuit is beyond the scope of the cited IRCA provisions.

Nevertheless, we agree with the district court that the magistrate judge did not rely on IRCA to justify its protective order. That the protective order comports with one of the *purposes* of IRCA's reverification provision – to prevent employers from intimidating workers from exercising their rights by repeatedly raising the specter of deportation – does not mean that the protective order *depended upon* IRCA for legal support. The district court rightly considered the threat of intimidation and retaliation when assessing the burden the discovery would place on the plaintiffs. We find that while IRCA does not require the protective order the magistrate judge issued, neither does the Act show that the protective order was "contrary to law."

IV. Conclusion

We hold that the district court properly exercised its discretion in concluding that NIBCO's proposed discovery placed an "undue burden" on the plaintiffs.[19] The court did not err in determining that it would substantially burden the plaintiffs to allow the defendant to use the discovery process to inquire into their immigration status – a status that NIBCO had the opportunity to examine upon hiring and that is irrelevant to the question of liability. We seriously doubt that *Hoffman*'s prohibition of NLRB-authorized backpay awards under the NLRA serves to prohibit a district court from awarding backpay to a Title VII plaintiff. But even if we were to conclude that *Hoffman* did preclude backpay awards to illegal immigrants under all federal statutes, it would not matter in this case. *Hoffman* does not make immigration status relevant to the determination whether a defendant has

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[19] We differ with our concurring colleague in only minor respects. We do not agree that it might be "more efficient," post at 4843, to allow NIBCO to question the plaintiffs concerning their immigration status during the liability phase of the trial. Indeed, in our view, such questioning might be profoundly inefficient if, as seems likely to us, it might serve to discourage legal and illegal immigrants alike from pursuing their potentially valid legal claims not only in this case, but in future cases as well. Moreover, we do not believe it correct to state that the district court may allow NIBCO to inquire into the information now protected once "liability has been ascertained." *See* post, at 4843. Whether it would be proper for such discovery to proceed depends on the outcome of two issues about which there is considerable doubt. First, although we have left open the question whether *Hoffman* applies in a Title VII action, we emphasize that we have serious reservations about its applicability. Second, as for *McKennon*, the record does not indicate whether NIBCO would be able to satisfy its burden of proof under *O'Day*, 79 F.3d at 758-59. Only if NIBCO came forward with persuasive evidence regarding its practices and policies would it be appropriate for it to inquire into the plaintiffs' immigration status under the after-acquired evidence doctrine.

committed national origin discrimination under Title VII. If the district court decides to bifurcate the proceeding, as the plaintiffs have requested, the availability of backpay remedies for certain plaintiffs will be determined, if at all, only after the liability phase. Similarly, neither IRCA nor the after-acquired evidence doctrine requires the district court to allow NIBCO's requested discovery. It was neither erroneous nor contrary to law for the district court to protect the plaintiffs, and the public interest, from being unduly burdened by issuing the protective order.

We AFFIRM the decision of the district court and REMAND for further proceedings consistent with this opinion.

SILER, Circuit Judge, concurring:

I write separately in concurring because I would affirm the ruling of the magistrate judge in denying discovery as not being clearly erroneous or contrary to law, as stated in the majority opinion. Had the magistrate judge ruled to the contrary, that is, denied a protective order, I might very well affirm any appeal by the plaintiffs for a denial of the protective order on the same basis, that is, the ruling was not clearly erroneous or contrary to law.

If the district court decides to bifurcate the trial on the issues of liability and damages, the documented status of the plaintiffs would not likely be relevant in the first part of the trial. It might be more efficient if the district court allowed NIBCO to question the plaintiffs concerning their documented status during the liability phase, because the information might give rise to motions for summary judgment early in the proceedings. However, we are not here to rule on the efficiency of the district courts in moving cases through their dockets.

It appears to me, as the majority admits, that it is arguable that either *Hoffman Plastic Compounds, Inc. v.*

NLRB, 535 U.S. 137 (2002); or *McKennon v. Nashville Banner Publ'n Co.*, 513 U.S. 352 (1995), would preclude the award of damages, at least in part, for an undocumented worker. The applicability of either of those decisions, however, would be up to this court in a direct appeal from any damage award. Therefore, the district court may later in its proceedings after liability has been ascertained allow NIBCO to inquire into these matters that are now protected.

I emphasize that this is an interlocutory appeal, not on the merits of this case. Unless this case is resolved by settlement, it will be up to this court to resolve many of these issues on direct appeal later.

MARTHA RIVERA; MAO HER; ALICIA ALVAREZ; EVA ARIOLA; PEUANG BOUNNHONG; ROSA CEJA; CHHOM CHAN; BEE LEE; PAULA MARTINEZ; MARIA DOMITILIA MEDINA; MAI MEEMOUA; MARGARITA MENDOZA; BAO NHIA MOUA; ISIDRA MURILLO; MARIA NAVARRO; VATH RATTANATAY; OFELIA RIVERA; SARA RIVERA; MARIA RODRIGUEZ; MARIA RUIZ; MARIA VALDIVIA; SY VANG; YOUA XIONG; SEE YANG; XHUE YANG, Plaintiffs-Appellees,

v.

NIBCO, INC., an Indiana corporation, Defendant-Appellant.

No. 02-16532

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed September 20, 2004

Before: Stephen Reinhardt, Eugene E. Siler, Jr.,* and Michael Daly Hawkins, Circuit Judges.

Order;
Dissent by Judge Bea

*Honorable Eugene E. Siler, Jr., Senior Judge for the United States Circuit Court of Appeals for the Sixth Circuit, sitting by designation.

ORDER

Judges Reinhardt, Siler and Hawkins voted to deny the petition for rehearing. Judges Reinhardt and Hawkins voted to deny the petition for rehearing en banc and Judge Siler so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petitions for rehearing and rehearing en banc are denied.

BEA, Circuit Judge, with whom Circuit Judges KOZINSKI, KLEINFELD and GOULD join, dissenting from the denial of rehearing en banc:

The panel's decision allows a plaintiff who claims that racially discriminatory firing caused backpay and frontpay lost wages, to refuse to answer deposition questions touching on her place of birth and immigration status.

Thus, the panel's decision impedes the ascertainment of the truth in advance of trial, thereby profoundly subverting the purposes of liberal Discovery in civil cases. The decision also frustrates the purposes of national Immigration policy: to limit employment benefits to American citizens and foreign persons authorized to work in this country.

It may be tempting to increase the settlement value or the award of a minority worker's racial discrimination lawsuit by allowing her to include claimed lost wages and bar questioning of her immigration status. After all, the employer hired her and benefitted from her labor. While she was

working, the employer did not dig too deep into whether her papers were in order. Now that she asserts her civil rights against the employer's claimed discriminatory firing, the employer gets righteous, and for all the wrong reasons.

If estoppel by the employer's acts could bar enforcement of our country's Immigration laws, the panel's opinion might not be so objectionable. Of course, we know such private conduct cannot frustrate explicitly stated congressional public policy. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002) (holding that plaintiffs, who were unauthorized aliens, were not entitled to backpay as a remedy for violation of the NLRA because such remedy would "unduly trench upon" federal immigration policy expressed in the IRCA).

We risk corrupting an admirable civil rights policy to prevent discrimination when we rely on evasions to enforce it. Further, such evasions are not necessary to enforce that policy were the plaintiffs forthrightly to waive only one of their money claims, the one based on a possibly illegal contract, while retaining other money, equitable and counsel fees' claims.

The fact is that if plaintiffs do not have authorized immigration status, they are not entitled to be awarded back wages or wages they might have earned in the future from a job which they were incapable of holding, under our Immigration laws. *See Hoffman Plastics Compounds, Inc.*, 535 U.S. at 151-52.

To justify evading this obvious fact, the panel generates a fog of half-convincing procedural distractions, all of which disappear when examined under the light of principled reasoning and authorities.

1. *The standard of review dictates the result?*

Arguing the district court's decision affirming the Magistrate's order is "only" a Discovery order, and decides none of the merits, the panel seems to be deciding only a

preliminary matter which, if wrong, can later be dealt with by the same trial court sometime before trial, or in trial.

This is precisely against the view of this court that the broad right of discovery is "based on the general principle that litigants have a right to 'every man's evidence,' and that wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth." *Shoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (internal quotation marks and citations omitted).

Since the adoption of the Federal Rules of Civil Procedure in 1938, the courts have consistently held that Discovery was to serve as a device to clarify the basic issues between the parties. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("the various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues").

Further, pre-trial discovery has been recognized as an essential means for evaluation of damages, so that settlements can be achieved. *See United States v Meyer*, 398 F.2d 66, 71 (9th Cir. 1968) (noting that encouraging settlements is a basic purpose of pre-trial discovery).

Absent bifurcation or phasing of issues by case management procedures,[1] there simply is no principled reason for delaying frank investigation of the nature and extent of damages, unless it is a desire to advantage the plaintiffs, at least temporarily, and for the purposes of driving a higher settlement. Tellingly, the district court did not indicate that it was premature to consider discovery into wage loss claims.

The panel's decision could be read merely as an affirmance of the trial court's exercise of discretion in case

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[1] The district court failed to act on suggestions of bifurcation. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068 (9th Cir. 2004).

management "at this early stage in the litigation." *Rivera*, 364 F.3d at 1064. If that is what the panel meant, it was wrong. The use of "early stage" is merely a characterization of an abstraction to avoid the facts of this case. What is likely, or even possible, to change as to the wage loss claim in the course of the litigation? Plaintiffs either did or did not suffer wage loss, depending on whether they had a legal right to hold their jobs. When is it "too soon" to ask a plaintiff claiming damages questions of fact as to whether she was and is legally entitled to those damages?[2]

Another abstraction presented, but unexamined, by the panel is the concept the district court engaged in: a "balancing of hardships," a basis of decision to which much discretion is given. *See Rivera*, 204 F.R.D. 647, 649 (E.D. Cal. 2001). Let us then examine the hardships:

a. *Plaintiffs' hardships.*

If forced to answer birthplace and immigration status questions, plaintiffs will suffer the hardships of (a) possibly admitting lack of American citizenship or visa status

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[2] By granting the protective order, the district court improperly thwarted a core purpose of discovery: facilitation of settlement. Discovery that a plaintiff is not entitled to back wages because of her unauthorized alien immigration status would drive down the monetary value of the claim, and let both sides more realistically assess whether litigation for the value of the remaining claim is worthwhile. Indeed, "discovery on damages not only assists the parties in preparing for trial, it also educates each party on the other's view of the damages, which, in turn, assists each party in evaluating essential elements of the matters in issue and in assessing the risks associated with an adverse decision in the action." *Johns Hopkins Univ. v. Cellpro*, 160 F.R.D. 30, 35 (D. Del. 1995). What is more, it will allow the defendant to make an offer of settlement by way of permission to take judgment in an amount, cutting off the plaintiffs' right to recover costs and attorneys' fees if the eventual award does not exceed the offer of judgment. *See* FED. R. CIV. P. 68; *Mallory v. Eyrich*, 922 F.2d 1273, 1278 (6th Cir. 1991).

permitting work and thereby lose the right to recover wage losses, past and future, and (b) risk providing evidence of lack of authorized alien status to the authorities, leading to possible removal from the United States.

Both of these "hardships" are merely threats to end plaintiffs' enjoying benefits to which they are not entitled under the law.

b. *Defendant's hardships*.

Defendant will have to prepare for trial or enter into settlement negotiations without essential proof to defend against the claims for wage loss, past and future, as well as foundational evidence (place of birth) for actuarial projections for the possible extent of non-economic damages (duration of emotional distress).

Both of these hardships are deprivations of rights heretofore guaranteed to the defendant by the Federal Rules of Civil Procedure (Rule 26 *et seq.*) for preparation of its defense at trial.

Hence, the "balancing of the hardships" involves the preservation of illegal benefits (to plaintiffs) versus the vindication of trial preparation rights granted to all litigants (defendant).

I respectfully submit that when viewed in the facts of this case, rather than as an airy abstraction, the "balance of hardships" makes the district court ruling for the plaintiff "clearly erroneous or contrary to law." Where, as here, a district court's discovery order is "clearly erroneous or contrary to law," the function of this court is not to ignore it, but to correct it. *See* FED. R. CIV. P. 72(a); *see also Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002).

2. *Plaintiffs' place of birth is irrelevant to the issues*?

The basis of the panel's decision was solely that discovery as to the plaintiffs' place of birth is irrelevant; and that discovery as to their immigration status would have a "chilling effect" on the plaintiffs' exercise of their civil rights.

See Rivera, 364 F.3d at 1062, 1064. Let us first examine the "irrelevancy" of plaintiffs' place of birth.

This determination is so clearly wrong, the panel's decision shies from touching it. First, the protective order prohibits questioning into plaintiffs' place of birth on the grounds that place of birth was "not relevant" to plaintiffs' claims. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647, 649 (E.D. Cal. 2001) ("there appears to be no dispute that each plaintiff is a member of a protected class, and further questions regarding where each plaintiff was born has no relevance to this action"). That ruling is clearly incorrect and demonstrates ignorance of issues of damages common to trials. Plaintiffs' place of birth is relevant insofar as longevity is the multiplicand in the computation of frontpay damages; it is also relevant to the calculation of the duration of emotional distress damages. For example, a woman born in the U.S. has a life expectancy of 80.05 years; while a woman born in Mexico has a life expectancy of 75.49 years. *See* CIA World Factbook, 2004. As any trial lawyer knows, the longer the life expectancy, the higher the economic and non-economic damages claims which can be presented to the jury on the "blackboard" in final argument.

It will not do to say the relevance of this issue is only marginal and that the trial court was in the best position to judge its relevancy against the harm it might produce and that we should accord discretion to its relevancy ruling. The record plainly shows the trial court – and indeed this panel – never considered nor weighed the significance of this life expectancy evidence as a factor in computation of damages.

3. *Plaintiffs' immigration status need not be revealed*?

Plaintiffs' immigration status is relevant in two respects: (1) under the Supreme Court's decision in *Hoffman*, unauthorized aliens are not entitled to backpay and frontpay

damages under Title VII[3] and (2) under the after-acquired evidence doctrine, plaintiffs are precluded from recovering backpay and frontpay damages for discrimination under Title VII, once an employer discovers that plaintiffs are unauthorized aliens, if the employer proves that upon discovery of the unauthorized alien status, the employer

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[3] The panel concludes that even if *Hoffman* precludes an award of backpay under Title VII, defendants are nevertheless still not entitled to a protective order because "*Hoffman* does not make immigration status relevant to the determination whether a defendant has committed national origin discrimination under Title VII." *Rivera*, 364 F.3d at 1074-1075. That is, the panel concludes that even if immigration status is relevant to a determination of damages, it is not relevant to a determination of *liability*. *See Rivera*, 364 F.3d at 1069-70 (that the plaintiff is not eligible for certain remedies "merely goes to the issue of damages, not liability"). The panel's opinion signals a notion that a finding of liability alone can be a sufficient and satisfactory object of the action. In so doing, the panel overlooks basic tort law: a claim for relief requires not only a breach of duty, but also that the breach of duty caused damages. A breach of duty, without damages, is not actionable. However, discovery is generally not limited to relevant evidence of liability, but includes damages as well. *See, e.g., Dogan Enters. v. Hubsher*, 1987 WL 20312, *6 (E.D.N.Y. 1987) ("pretrial discovery as to damages is generally available since issues of liability and damages normally go to the jury at the same time"); *Technograph, Inc. v. Texas Instruments, Inc.*, 43 F.R.D. 416, 419 (S.D.N.Y. 1967) ("In general, discovery before trial as to damages is proper"). It makes no sense to bifurcate the proceedings for discovery purposes unless the court is going to "stage" proceedings to avoid needless discovery costs. In the final analysis, the panel correctly declines to bifurcate the proceeding. That decision is, in the first instance, a prerogative of the district court; the district court has not adopted bifurcation. But if no bifurcation occurs, defendants will not get another opportunity to take discovery with respect to damages. *Id.* at 1075. It also bears repeating the district court has not bifurcated the trial into liability and damages phases, so that a special verdict on liability above will not be rendered.

would have complied with the law and terminated the employee's employment.[4] Indeed, the magistrate judge acknowledged that plaintiffs' immigration status was relevant to the litigation, but nonetheless issued a protective order prohibiting questioning into plaintiffs' immigration status on the ground that allowing defendant to so inquire would "unnecessarily chill legitimate claims of undocumented workers under Title VII." *Rivera*, 364 F.3d at 1062; *see also Rivera*, 204 F.R.D. at 649. Accordingly, the magistrate judge "barred all discovery" into plaintiffs' immigration status, but inexplicably "did not preclude NIBCO from conducting its own investigation." *Rivera*, 364 F.3d at 1062. It is contradictory to say that NIBCO can continue to investigate plaintiffs' immigrant status – which it could use to "rat out" the plaintiffs to the immigration authorities – but cannot ask plaintiffs that question on deposition. The magistrate judge's order is an incomplete remedy inasmuch as it is not accompanied by an in limine order precluding defendant from introducing such evidence at trial.[5] By granting the protective

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[4] *See, e.g., McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360-363 (1995) (noting that under the after-acquired evidence doctrine, an employee is precluded from receiving damages for wrongful discharge where the employer discovers evidence of wrongdoing that would have led to the employee's termination if the employer had known of the wrongdoing).

[5] One must object to the mischief created – however unwittingly – by the magistrate judge's order. The district court's order would allow the defendant to conduct an independent investigation as to plaintiffs' immigration status, but not to ask about it during deposition. Surely plaintiffs would use the discovery process as a sword and ask defendant whether it had discovered plaintiffs' immigration status. Defendant's answer would allow plaintiffs to tailor their testimony. But before trial, and before plaintiffs' choice as to what position to take were made, a risk of litigation would continue to add to the plaintiffs' leverage in settlement because the most unassailable method of proving the truth would continue to be forbidden. *See Fletcher v. Union Pacific*

order, the district court improperly denied defendant access to relevant information and thwarted the settlement purpose of discovery.

4. *Plaintiff's exercise of her civil rights will be affected by the "chilling effect" of pre-trial discovery of her immigration status*?

The federal rules provide for limitations on discovery in order to protect a person or party from "annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)). "If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." *Rivera*, 364 F.3d at 1063-64 (quoting *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)).

In general, the party seeking a protective order for discovery materials must demonstrate that "good cause" exists for the protection of that evidence. "Good cause" is established where it is specifically demonstrated that disclosure will cause a "specific prejudice or harm." *Phillips*, 307 F.3d at 1211-12. Courts have held that the showing of "good cause" under Rule 26 is a heavy burden. *See Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c)) test." *Phillips*, 307 F.3d at 1211-12 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).[6]

R.R. Co., 194 F.R.D. 666, 670 (S.D. Cal. 2000) (Plaintiff is entitled to obtain pre-trial discovery of video surveillance tapes where plaintiff demonstrates substantial need for them and demonstrates that he cannot obtain without undue hardship).

[6] In balancing private and public interests, courts have looked to the following factors:

(1) whether disclosure will violate any privacy interests;

In the instant case, in upholding the validity of the protective order, the panel concludes – in little more than an *ipse dixit* – that disclosure of plaintiffs' immigration status would have a "chilling effect" on plaintiffs' willingness to assert their statutory rights and that this "chilling effect" outweighs defendant's interest in obtaining such evidence. Indeed, the panel notes repeatedly that allowing employers to inquire into plaintiffs' immigration status would have a "chilling effect" on plaintiffs' willingness to seek redress for violations of their workplace rights. *See Rivera*, 364 F.3d at 1061, 1062, 1064-65, 1065 n.5, 1072 (nine references to "chill" or "chilling effect").[7] This argument is a shibboleth.

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(2) whether the information being sought is for a legitimate purpose or for an improper purpose;
(3) whether disclosure of the information will cause a party embarrassment;
(4) whether confidentiality is being sought over information important to public health and safety;
(5) whether the sharing of information among litigants will promote fairness and efficiency;
(6) whether a party benefitting from the order of confidentiality is a public entity or official; and
(7) whether the case involves issues important to the public.

See generally Phillips ex rel. Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1211-12 (9th Cir. 2002) (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

[7] The term "chilling effect" was first introduced into the legal lexicon by Justice Frankfurter in his concurring opinion in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (requirement that teachers take anti-Communist oath "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice"). *See Donohoe v. Duling*, 465 F.2d 196, 199 n. 6 (4th Cir. 1972) (discussing history of the term). The term is usually used in connection with analyzing restrictions of free speech under the First Amendment. In such cases, a party is deprived of the ability to engage in certain forms of speech,

While it may be a polemical argument appealing to some, the panel points to no evidence to substantiate its conclusion that anyone in this lawsuit would be so "chilled." Under the law, evidence, not speculation, is required. *See King v. Conde*, 121 F.R.D. 180, 193 (E.D.N.Y. 1988) (balancing interests and denying police officers a protective order where officers failed to produce evidence of "chilling effect" on officer's candor in civil rights cases; court concluded "there is no empirical evidence of which this court is aware supporting the 'chilling' contention").

Perhaps the lack of evidence here should not be surprising, given that the panel's *ipse dixit* hunch is wrong. "Unchilled" but unauthorized aliens are not only entitled to, but have sought emotional distress damages, punitive damages, and attorneys' fees under Title VII and the California Fair Employment Housing Act and have, in fact, sought to vindicate their workplace rights. I point to 17 "unchilled" plaintiffs, represented by San Francisco's La Raza Centro Legal and pro bono attorneys who brought suit in *Aguilar v. Avis Rent-A-Car System, Inc.*, 45 Cal. App. 4th 933, 973 (1996), *aff'd*, 21 Cal. 4th 121 (1999), *cert. denied*, 529 U.S. 1138 (May 22, 2000) (Thomas, J., dissenting).[8]

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guaranteed under the First Amendment, for fear of being prosecuted. Such cases are far different from the instant case, in which the plaintiffs allege that the so-called "chilling effect" dissuades them from maintaining a civil action seeking certain economic damages (*i.e.*, backpay, frontpay and/or reinstatement), which are not only not guaranteed them, but are prohibited them, if they have no legal right to hold the job. It may be wrong to chill a teacher's "spirit" to range freely over unchartered grounds in a search for knowledge, but what is wrong with "chilling" the bringing of an ultimately unmeritorious claim for economic damages?

[8] At plaintiffs' request, the trial court granted an *in limine* order banning questioning of plaintiffs' immigration status, but only after plaintiffs had waived claims for backpay and frontpay

Hispanic plaintiffs, without proof of immigration status, recovered emotional distress damages and attorneys' fees. *See Aguilar* (awarding emotional distress damages and attorneys' fees to Hispanic employees who brought suit for employment discrimination under FEHA, the California analogue to Title VII).

The panel instead asserts that "the caselaw substantiates" the panel's fear that plaintiffs will be "chilled." In support of its assertion, the panel cites cases in which employees claimed to have been retaliated against when they sued their employer for violations of civil rights and labor laws. *See Rivera*, 364 F.3d at 1064. First, plaintiffs clearly *did* bring claims in those cases, regardless of the asserted "chilling effect." Second, that unauthorized aliens fear the legal consequences of breaking the law ought not prevent defendants from proving that plaintiffs are not entitled to certain forms of relief.[9]

Moreover, the panel notes that the Ninth Circuit had awarded backpay and frontpay to unauthorized aliens before *Hoffman*. *See Rivera*, 364 F.3d at 1064 & n. 4. Rather than

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(loss of wages) caused by the claimed discrimination. I was the trial judge.

[9] Moreover, the panel cites a law review article by Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676-79 (2003) for the proposition that unauthorized aliens are "reluctant to report a variety of labor and employment law violation." *Rivera*, 364 F.3d at 1065. Tellingly, however, that same law review article concedes that "though common sense suggests that undocumented workers are reluctant to report labor and employment violations to law enforcement agencies for fear they will expose themselves to deportation – and that this reluctance fosters further exploitation – *there has been little empirical research* on the extent and causes of immigrant underreporting." *Id.* at 677 (emphasis added). "Common sense," particularly that of special pleaders, should not be accepted as a substitute for *evidence*.

any *evidence* that unauthorized workers were "chilled" in the exercise of their civil rights, we have *evidence* they were not "chilled" from vindicating their rights under Title VII. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (awarding backpay to five unauthorized aliens in a Title VII action) and *Rios v. Enterprise Asso. Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168 (2d Cir. 1988) (six unauthorized aliens sought backpay under Title VII). *See also Patel v. Quality Inn South*, 846 F.2d 700, 705 (11th Cir. 1988) (unauthorized alien sought backpay under Fair Labor Standards Act); *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 718 (9th Cir. 1986) (unauthorized aliens entitled to backpay for employers' violations of the FLSA), overruled by *Hoffman Plastics*; *Alvarez v. Sanchez*, 482 N.Y.S.2d 184 (4th Dep't 1984) (unauthorized alien sued for backpay for employer's violation of the FLSA); *Lopez v. Superflex, Ltd.*, 2002 WL 1941484, *2 (S.D.N.Y. Aug. 21, 2002) (unauthorized alien sued for backpay for employer's violation of the ADA and New York State Human Rights Law).

Against this phalanx of unauthorized alien plaintiffs and Governmental institutions (EEOC, California Department of Fair Employment and Housing, etc.), which have acted to vindicate anti-discrimination-in-employment rights, where in the panel opinion is the citation of any *evidence* of the claimed "chilling effect"? Where is the affidavit of a frustrated "Doe" claimant who claims he was "chilled" into lamb-like acceptance of civil rights violations? Where is the affidavit of the sociological expert witness, a fixture of civil rights litigation for 50 years, attesting to the psychological fear which prevents litigation? Where is the affidavit of a field investigator to show that dozens of wronged plaintiffs are cowering in fear of detection should they approach the courthouse?

Dare it be mentioned? Where is the affidavit of an *attorney* for an activist organization who, whilst keeping the names of the "chilled" confidential, tells us of the cases he

has not been able to bring because of the "chilling effect" that such potential clients would be informed upon by vengeful employer defendants?

Moreover, the panel argues that employers will use plaintiffs' immigration status to "rat out" the plaintiff to the U.S. Immigration and Customs Enforcement Bureau.[10] But isn't this exactly what a good citizen should do: denounce a crime which has been committed? Apparently, what the panel *wants* the employer to do is to keep it quiet *if* it learns of the felony.[11]

As a general rule, a citizen has no duty to denounce a crime he has seen committed, but if he knows that a crime has been committed (*i.e.*, an unauthorized alien has been employed) and keeps quiet about it, he may also be committing one or more felonies. *See* 18 U.S.C. § 4 (prohibiting "misprision of a felony"); *see also* 8 U.S.C. § 1324(a)(1)(A)(iii) (making it a crime to shield unauthorized aliens from detection); *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977) (affirming prosecution of employer under 8 U.S.C. § 1324(a)(1)(A)(iii)).

4. Hoffman Plastics Compound, Inc. v. NLRB *does not stand for the proposition that unauthorized aliens are not entitled to Backpay, Reinstatement or Frontpay under Title VII*?

In *Hoffman Plastics*, the U.S. Supreme Court held that unauthorized aliens who sued their employer for engaging in unfair labor practices in violation of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. §§ 151 *et*

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[10] On March 1, 2003, the INS ceased to exist and its functions were transferred to the Department of Homeland Security. The U.S. Immigration and Customs Enforcement has assumed many of the INS's enforcement functions. *Hernandez v. Ashcroft*, 345 F.3d 824, 828 & n.2 (9th Cir. 2003).

[11] As NIBCO is all too likely to learn through its own investigation, allowed by the magistrate judge's order.

seq. ("NLRA" or the "Wagner Act" of 1935) were not entitled to an award of backpay because of their immigration status as unauthorized aliens.

In so holding, the court reasoned that federal immigration policy, as codified by the Immigration Reform and Control Act of 1986 ("IRCA"), foreclosed such an award. In particular, under IRCA, it is a crime for an unauthorized alien to tender fraudulent documents in order to procure work. 8 U.S.C. § 1324c(a). Moreover, if an employer unknowingly hires an unauthorized alien, the employer must discharge the worker upon discovery of the worker's unauthorized status. 8 U.S.C. § 1324a(a)(2). Employers who know of the worker's unauthorized status and fail to discharge such worker are subject to civil fines and may be subject to criminal prosecution. 8 U.S.C. § 1324a(e)(4)(A). It is no defense to IRCA that at the original hiring, the employee presented an apparently valid Social Security card, if the employer now knows he is an unauthorized alien. The court in *Hoffman* reasoned that it could not award backpay to unauthorized aliens without contravening IRCA. The court concluded that:

> allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.

Hoffman, 535 U.S. at 151-52.

In the instant case, in concluding that the court can grant to unauthorized aliens suing under Title VII the remedies of backpay, frontpay and reinstatement, the panel argues that *Hoffman* does not preclude such an award. In so holding, the panel would limit the *Hoffman* decision to preclude an award of backpay to unauthorized aliens suing under the NLRA and not under Title VII. *See Rivera*, 364 F.3d at 1064-66. The panel wrote:

> the precise question before the Court [in *Hoffman*] was whether the NLRB had the authority under the NLRA to award backpay to undocumented workers notwithstanding the prohibition on hiring such workers in the Immigration Reform and Control Act of 1986 ("IRCA"). Answering that question in the negative, the majority also strongly suggested that the policy goals of IRCA outweigh those of the NLRA, and therefore that IRCA would preclude any backpay award to illegal immigrants under the NLRA.
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> We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases.

Rivera, 364 F.3d at 1066-67.

The panel reaches this conclusion by arguing that the significant differences between Title VII and the NLRA compel a conclusion that "*Hoffman* does not resolve the question whether federal courts may award backpay to undocumented workers who have been discharged in violation of Title VII."[12] *Rivera*, 364 F.3d at 1058. The panel

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[12] Indeed, the administrative agency charged with enforcing Title VII rescinded its 1999 enforcement guidance entitled "Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws" after the *Hoffman* decision was decided. *See* http://www.eeoc.gov/policy/docs/undoc-recind.html visited June 15, 2004. Moreover, the EEOC has cited *Hoffman* for the proposition that "relief may be limited if an individual subjected to discrimination does not have appropriate work authorization." *See* http://www.eeoc.gov/policy/docs/ national-origin.html visited June 15, 2004. The EEOC's determination is entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See EEOC v. Dinuba Medical Clinic*, 222 F.3d 580, 589 (9th Cir. 2000) (according deference to the EEOC's

argues that the NLRA has a narrower purpose than Title VII. In support of this contention, the panel first argues that the NLRA's purpose is to grant remedies for unfair labor practices by administrative means, not court action.

By contrast, Title VII actions are enforced primarily by means of private actions.[13] Second, the panel argues that Title VII provides for broader remedies than does the NLRA. Specifically, the NLRA provides for backpay, frontpay and reinstatement, while Title VII allows for compensatory and punitive damages as well as backpay, frontpay and reinstatement. Third, the NLRB is only empowered to award backpay when it has found that an employer has engaged in an unfair labor practice. Under Title VII, a federal court determines whether a civil right violation merits an award of backpay. In the panel's view, "this difference is significant" in light of the reasoning in *Hoffman* that "given the strong policies underlying IRCA and the Board's limited power to construe statutes outside of its authority, the NLRB's construction of the NLRA was impermissible." *Rivera*, 364 F.3d at 1068. That is, the *Hoffman* decision was predicated upon the fact that the NLRB had limited authority and therefore could not weigh competing federal interests, whereas the federal courts do in fact have such authority when construing Title VII. Accordingly, the panel proceeds to weigh the "competing federal interests" at issue here and concludes that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." *Rivera*, 364 F.3d at 1069.

This is not logical. First, the district court in *Rivera* was not called upon to weigh the "policy considerations" of Title

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Enforcement Guidance discussing the compensatory and punitive damages available under Title VII).

[13] But not always. Administrative remedies exist and are used both under Title VII (*see* 42 U.S.C. § 2000e-5) and California's FEHA (*see* CAL. GOV'T CODE §§ 12963).

VII versus the "policy considerations" of the IRCA, something which the panel opinion determines the NLRB was not "expert" enough to do. The only issue for the district court in *Rivera* was to determine what damage remedies Title VII provides.[14] Under Title VII, a prevailing party may obtain backpay, reinstatement (or frontpay for those electing not to be reinstated), as well as compensatory and punitive damages. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851-52 (2001) (noting that remedies available under Title VII are backpay, frontpay, reinstatement, compensatory and punitive damages); *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998) (same).[15]

Under Title VII, backpay and frontpay or reinstatement are provided as remedies if and only if the alleged discrimination caused the plaintiff damage. Congress has

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[14] The panel is correct that the Ninth Circuit has recognized that unauthorized aliens are entitled to the protections of Title VII. *See EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989). However, the question at issue is not whether Title VII applies to unauthorized aliens (it does), but which damage remedies are available – and which are not available – to unauthorized aliens under the statute.

[15] Similarly, a plaintiff suing under California FEHA, CAL. GOV'T CODE §§ 12940 *et seq.*, (as do plaintiffs here, asserting pendant jurisdiction) may recover backpay, frontpay, reinstatement (*see* § 12790) in addition to compensatory and punitive damages (*see e.g., Martinez v. Kirk Xpedx*, 2003 U.S. Dist. LEXIS 12657, 2003 WL 21715875, *1 (N.D. Cal. 2003) (successful plaintiff may recover compensatory and punitive damages under FEHA)). CAL. GOV'T CODE § 12790 provides, in pertinent part, that if the commission finds that defendant has engaged in an unlawful practice, plaintiff may be entitled to "hiring, reinstatement, or upgrading [], with or without backpay . . . the payment of actual damages as may be available in civil actions under this part. Actual damages include, but are not limited to, damages for emotional injuries if the accusation or amended accusation prays for those damages."

already determined that vindication of the employee's civil rights require backpay and frontpay or reinstatement. *See* 42 U.S.C. § 2000e-5(g); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 450 (1975) (noting that Congress gave courts ability to award backpay in title VII cases to "eliminate, as far as possible, the last vestiges" of discrimination).

However, courts will award a damage remedy under Title VII only where the plaintiff has proven he actually suffered the claimed loss. Indeed, since there is a statutory duty to mitigate damages, courts have held that a precondition for a claim for backpay and reinstatement or frontpay under Title VII is that the plaintiff be in all manner ready, willing and legally capable of performing alternate work at the commencement and through the backpay period. *See Ackerman v. Board of Educ.*, 387 F. Supp. 76, 81 (S.D.N.Y. 1974) ("in order to establish eligibility for an award of backpay under equal opportunities law, a claimant must prove as a first step . . . that he was ready, willing and able to work"; plaintiff suing under Title VII not entitled to backpay where he could not show that he applied for teaching position at a number of public schools). *See also U.S. v. Wood Wire & Metal Lathers Int'l. Union*, 328 F. Supp. 429, 443 (S.D.N.Y. 1971) (plaintiffs entitled to backpay where they could prove that they mitigated damages by working on alternate jobs). Moreover, physical inability to work bars a backpay claim. *See EEOC v. Indep. Stave*, 754 F. Supp. 713, 721 (E.D. Mo. 1991) (holding that plaintiff could not recover backpay where physical injury prevented her from working at alternate job for purposes of mitigating damages); *Martin v. Dep't of Air Force*, 184 F.3d 1366, 1367-68 (Fed. Cir. 1999) (plaintiff not entitled to backpay for period of time he was physically unable do physical tasks required by his work). Similarly, voluntary removal from the labor market removes backpay claim. *See Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985) (plaintiff who removed herself from labor market by attending law school not entitled to backpay); *Stevens v. Tennessee Valley Authority*, 805 F.2d 1036, 1986 WL 18134,

*6 (6th Cir. 1986) (plaintiff not entitled to backpay where he was unable to work due to National Guard duties).

So it is here. An unauthorized alien cannot show that she is "ready, willing and able" to perform the work, during the time she was off work, because it would be in violation of the IRCA – *i.e.*, illegal – for her to do so.[16] It is axiomatic that a contract with an illegal purpose bars enforcement of such contract; no damages are incurred by its breach. *See* Witkin, *Summary of Cal. Law* (9th ed. 1987) Contracts, § 441; *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 880 (9th Cir. 2000) (contract to launder money fraudulently was illegal and unenforceable; "hornbook law is that a contract is illegal if it [] has an illegal purpose"); *Hedla v. McCool*, 476 F.2d 1223, 1227 (9th Cir. 1973) (contract for Seattle architects to design a building to be constructed in Alaska not enforceable where architects were not licensed in Alaska).

Moreover, the panel's conclusion that *Hoffman* stands for the proposition that backpay, frontpay and reinstatement are not available to plaintiffs suing under the NLRA alone because the NLRA is narrower than Title VII is incorrect. First, the panel correctly notes that the NLRA is enforced by the NLRB, while Title VII is primarily enforced by private causes of action. However, the question here is not *who* can vindicate the rights, but *what damages* can be recovered. As to backpay and frontpay, both the NLRA and Title VII

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[16] Similarly, the backpay or frontpay or reinstatement remedy is only available where the damages were *caused* by the discriminatory conduct. If the employment is terminated because of a good faith reason, *e.g.*, where the plaintiff is incompetent; the plaintiff is disabled and cannot be made productive by "reasonable accommodations," the fact that he was *also* terminated because of discrimination does not entitle him to backpay or frontpay or reinstatement. *Brady v. Thurston Motor Lines*, 753 F.2d 1269, 1278-79 (4th Cir. 1985) (employer was entitled to reduce backpay for periods when the employees were off work because of separate violations of work rules which caused termination).

provide them as remedies. The two enactments are not broader or narrower as to this remedy. They are similar.

Second, the panel argues that Title VII is broader than the NLRA because compensatory and punitive damages are recoverable under Title VII but are not under the NLRA. This argument ignores the explicit congressional policy prohibiting payment of wage loss damages to anyone who lacks the immigration status or nationality to have a legal right to earn the wages claimed to have been lost. The question is not *whether* unauthorized aliens are entitled to compensatory and punitive damages – they are – but *what is the scope of* the compensatory damages available under the two statutes. Courts have recognized that the remedial language of the two statutes is virtually identical. *See, e.g., De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002) ("the remedial language of the National Labor Relations Act is very similar to Title VII's language"); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 447, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986) (noting that the enforcement provisions of Title VII were "modeled after [the NLRA]").

The NLRA provides for the following remedies:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter.

29 U.S.C. § 160(c)(emphasis added).

Title VII provides for the following remedies:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, *which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.*

42 U.S.C. § 2000e-5(g) (emphasis added).

Third, the panel notes that the NLRA is enforced by the NLRB, which is an administrative body of limited authority and Title VII is enforced by the federal courts. The panel points to language in *Hoffman* that the NLRB has the "discretion to select and fashion remedies for violations of the NLRA" and that such discretion, "though generally broad, is not unlimited" and concludes that it was only because of the NLRB's limited authority that it could not weigh the federal policy of abolishing unfair labor practices against U.S. immigration policy. *Rivera*, 364 F.3d at 1068 (citing *Hoffman*, 535 U.S. at 142-43). Please note, contrary to what the panel opinion argues, that it is *not* the NLRB that weighed the NLRA versus the IRCA and found the latter prohibited wage loss claims under the former. It was a federal court, just like the one the panel opinion says should do the weighing of "conflicting" policies. In that case, the federal court was the Supreme Court of the United States.

The panel then concludes that the district court in *Rivera* has the authority to make such a determination, opining that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." *Rivera*,

364 F.3d at 1069. This argument is profoundly incorrect. The *Hoffman* decision does not rest upon such a slender reed. Rather, in holding that unauthorized aliens are not entitled to backpay under the NLRA, the Supreme Court reasoned that "allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Hoffman*, 535 U.S. at 151-52. The same rationale applies here: allowing federal courts to award backpay to illegal aliens would also "unduly trench upon" federal immigration policy as codified in the IRCA. *Id.*

Finally, the panel cites no authority whatsoever for the proposition that the national policy against discrimination outweighs immigration policy, nor can it. Such an inquiry is inherently suspect. It is the province of Congress, not the courts, to weigh one policy against another, while it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). It is dubious that Congress intended that the societal value of civil rights cases to be so important that the court should allow unauthorized aliens to violate the Immigration law. Such a proposition is utterly without antecedent. There is nothing in either the *Hoffman* opinion or caselaw to suggest that the policy concerns underlying Title VII trump the policy considerations of the IRCA. The "policy considerations" of the NLRA have been national policy since 1935, 30 years longer than those of the 1986 Immigration Reform and Control Act. On the limited issue of special economic damages for claimed lost wages, why can't that same 1986 Immigration Reform and Control Act trump the 1964 Civil Rights Act the way it did the 1935 Wagner Act?

More fundamentally, why should a district court have any greater discretion to fashion remedies for civil rights violations which "trench upon federal statutes and policies" unrelated to Title VII (such as prohibitions on unauthorized aliens working in the U.S.) than does the NLRB? The district

court can still award remedies to vindicate Title VII rights such as (1) emotional distress damages, (2) punitive damages, and (3) attorneys' fees, all without "trenching upon" the IRCA policy of not allowing unauthorized aliens to work or to recover wage loss damages for work time loss in jobs to which they had no legal right.

By allowing the plaintiffs to refuse to answer questions, the answers to which might reduce their monetary recovery and make them vulnerable to removal, the panel accepts a gauzy and warm rationale for an evasion meant to impede the search for the truth. Such misguided compassion will surely corrupt the administration of our civil rights statutes, and threaten to bring them into public disrepute.

For these reasons, I respectfully dissent.

MARTHA RIVERA, et al., Plaintiffs,
v.
NIBCO, INC., et al., Defendants.

CV F 99-6443 AWI SMS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

December 21, 2001, Decided
December 21, 2001, Filed

COUNSEL:

For MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA DOMITILIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA - RODRIGUEZ, MARIA - RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE - YANG, XHUE YANG, plaintiffs: Alan Lawrence Schlosser, American Civil Liberties Union, Northern California, San Francisco, CA. William J Smith, Richtel and Smith, Fresno, CA. Christopher Vincent Ho, Donya C Fernandez, Employment Law Center, Legal Aid Society of San Francisco, San Francisco, CA. Marielena Hincapie, National Immigration Law Center, Oakland, CA.

For NIBCO INC, RM WADE CO, defendants: Howard Alan Sagaser, Sagaser Franson and Jones, Fresno, CA.

Before: ANTHONY W. ISHII, UNITED STATES DISTRICT JUDGE.

ORDER RE MOTION FOR RECONSIDERATION

On June 18, 2001, the Magistrate Judge entered an Order Granting Plaintiff s Motion for Protective Order. On June 26, 2001, Defendants filed a motion for reconsideration of the Magistrate Judge's ruling, pursuant to Rule 72(a), Federal Rules of Civil Procedure, and Local Rule 72-303. Plaintiffs oppose the motion for reconsideration. Oral argument was heard on the motion on October 1, 2001, after which the court requested further briefing on pertinent sections of the Immigration Reform and Control Act. The briefing was received from the parties and further oral argument was heard on December 10, 2001.

Rule 72(a), Federal Rules of Civil Procedure, provides as follows:

> (a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hen and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Local Rule 72-303 provides in part as follows:

> The standard that the assigned Judge shall use in all such requests is the "clearly erroneous or contrary to law" standard set forth in 28 U.S.C. § 636(b)(1)(A). See Fed.R.Civ.P. 72(a).

Defendants first contend that the Magistrate Judge erred in preventing them from determining Plaintiffs' places of birth. *See Espinoza v. Farah Mrg. Co.*, 414 U.S. 86, 88 (1973) ("the term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came"). Defendants claim that, "the Magistrate Judge basically has ruled that because the Plaintiffs have responded to interrogatories stating their ancestry, the issue as to their national origin is no longer relevant." Request for Reconsideration, 5:4-7. Defendants argue that this ruling is clearly erroneous and contrary to law.

Defendants misstate the Magistrate Judge's ruling. Rather than ruling that the issue as to Plaintiffs' national origin is no longer relevant, the Magistrate Judge ruled that because each Plaintiff has identified his or her national origin through responses to interrogatories and because there is no dispute that each Plaintiff is a member of a protected class, further questions as to where each Plaintiff was born have no relevance to this action. The court finds that this ruling is neither clearly erroneous nor contrary to law.

Second, Defendants contend that the Magistrate Judge erred in barring discovery concreting Plaintiffs' work status, presenting several separate arguments. The court notes at the outset that neither party has cited the court to controlling Ninth Circuit authority on this issue.

Initially, Dependents argue that the Magistrate Judge in adopting the reasoning of *Massey v. Trump's Castle*, 828 F. Supp. 314, 321 (D.N.J. 1993), adopted reasoning that was rejected in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Defendants, however, ignore the discussion of *McKennon*'s application to *Massey* found at pages 9 through 10 of the Magistrate Judge's Order. The court finds Defendants' argument to be meritless.

Next, Defendants argue that the Magistrate Judge was mistaken in stating that, "the defendant employer is not

placed in an adverse position because but for the lawsuit the employer never would have had reason to pursue such an inquiry." This statement obviously refers to Defendants' position as to determining Plaintiff's employment status, which is now no worse than it was before this lawsuit was filed. It does not refer, as Defendants imply, to Defendants' present position in litigating this lawsuit as compared with their position before the Magistrate Judge ruled on the discovery dispute.

Further, Defendants argue that the Magistrate Judge mistakenly held that Defendants should have engaged in an independent investigation regarding Plaintiffs' immigration status at the time of hiring, not post-discrimination. Defendants claim that the Immigration Reform and Control Act ("IRCA") has to such language and that the Magistrate Judge attempts to read into the IRCA a requirement that does not exist. The court finds that Defendants misconstrue the Magistrate Judge's statement, which in no way refers to the IRCA.

Furthermore, Defendants argue that the Magistrate Judge was mistaken in basing her decision in part "on the partial immunity granted to undocumented employees regarding their standing to bring a Title VII claims as granted by Hacienda Hotel and Tortilleria," claiming that neither case extends any form of discovery immunity to a plaintiff claiming discrimination. The court again finds that Defendants misconstrue the Magistrate Judge's statement, which does not refer to immunity from discovery, but clearly refers to standing granted to undocumented employees under Title VII.

Finally, Defendants take issue with the Magistrate Judge's reference to the possible serious ramifications to Plaintiffs, including possible deportation and criminal prosecution, of allowing defendants their requested discovery. The court finds that the Magistrate Judge correctly considered

the ramifications to all parties of her resolution of this discovery dispute.

The court has considered the further briefing provided by the parties and finds it informative, but not dispositive. Based on all of the above, the court concludes that Defendants have not demonstrated that the Magistrate Judge's ruling on discovery concerning Plaintiffs' work status is either clearly erroneous or contrary to Law.

Accordingly, Defendants' motion for reconsideration is HEREBY DENIED.

IT IS SO ORDERED

DATED: 12-21-01
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

MARTHA RIVERA, et al., Plaintiffs,
v.
NIBCO, INC., et al., Defendants.

CV-F 99-6443 AWI/SMS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

June 19, 2001, Decided
June 18, 2001, Filed

COUNSEL: For MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA DOMITILIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA - RODRIGUEZ, MARIA - RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE - YANG, XHUE YANG, plaintiffs: Edward Chen, NOT ED-CA ADMITTED, American Civil Liberties Union, Northern California, San Francisco, CA.

For MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA DOMITILIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA - RODRIGUEZ, MARIA - RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE - YANG, XHUE YANG, plaintiffs: William J Smith, Richtel and Smith, Fresno, CA.

For MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA DOMITILIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA - RODRIGUEZ, MARIA - RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE - YANG, XHUE YANG, plaintiffs: Christopher Vincent Ho, Donya C Fernandez, Employment Law Center, Legal Aid Society of San Francisco, San Francisco, CA.

For MARTHA RIVERA, MAO HER, ALICIA ALVAREZ, EVA ARRIOLA, PEUANG BOUNNHONG, ROSA CEJA, CHHOM CHAN, BEE LEE, PAULA MARTINEZ, MARIA DOMITILIA MEDINA, MAI MEEMOUA, MARGARITA MENDOZA, BAO NHIA MOUA, ISIDRA MURILLO, MARIA NAVARRO, VATH RATTANATAY, OFELIA RIVERA, SARA RIVERA, MARIA - RODRIGUEZ, MARIA - RUIZ, MARIA VALDIVIA, SY VANG, YOUA XIONG, SEE - YANG, XHUE YANG, plaintiffs: Marielena Hincapie, National Immigration Law Center, Oakland, CA.

For NIBCO INC, RM WADE CO, defendants: Howard Alan Sagaser, Sagaser Franson and Jones, Fresno, CA.

Before: SANDRA M. SNYDER, United States Magistrate Judge.

ORDER GRANTING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

(Doc. No. 33)

The above motion came on regularly for hearing on Friday, June 8, 2001, at Courtroom 4, before the Hon. Sandra M. Snyder, United States Magistrate Judge. Christopher Ho, Esq., and Donya Fernandez, Esq., of the Employment Law Center, appeared on behalf of plaintiffs Martha Rivera, et al.; William Hahesy, Esq., and Brian Enos, Esq., of Sagaser, Franson & Jones, appeared on behalf of defendants NIBCO, Inc., and R.M. Wade & Co. (NIBCO).

FACTS AND PROCEDURAL HISTORY:

Plaintiffs are "limited-English-proficient production workers who have been terminated from or otherwise disadvantaged in the terms and conditions of employment at [NIBCO's] facility . . . ." First Amended Complaint ¶ 34. Plaintiffs initiated this action on Oct. 1, 1999, and filed their First Amended Complaint on Feb. 24, 2000. Plaintiffs allege NIBCO hired plaintiffs knowing of their lack of English proficiency. *Id.* ¶ 42. Plaintiffs' job descriptions did not require English proficiency, and plaintiffs performed their respective jobs without incident for years. *Id.* ¶¶ 42 and 47. In 1997 or 1998, NIBCO required plaintiffs to take an examination given in the English language. *Id.* ¶ 43. Plaintiffs allege they performed poorly on the examination, and their poor performance on the examination initially led to adverse consequences, i.e., being required to take English as a second language classes, undesirable job assignments, et al., and thereafter terminations. *Id.* ¶¶ 50-52. The Court emphasizes that at this stage of the litigation the above are allegations only.

NIBCO deposed plaintiff Rivera on May 14, 2001. Sagaser Decl. Exh. D. At deposition, counsel for Rivera objected to certain questions asked by counsel for NIBCO regarding where Rivera was married and where Rivera was born, and directed Rivera not to answer such questions. *Id.*

18:22-24, 19:5-8, 21:7-12, 21:14-16, et al. This matter was not resolved, even after the parties sought assistance from Magistrate Judge Dennis Beck. *Id.* 27:14 et seq. Plaintiffs' motion for protective order followed.

Plaintiffs filed their motion for protective order on May 21, 2001. NIBCO filed opposition on May 29, 2001. Plaintiffs filed a reply on June 4, 2001, and an errata reply on June 5, 2001.

DISCUSSION:

"Upon motion by a person responding to a discovery request, and for good cause shown, the court is authorized to make any order which justice requires to protect the person from annoyance, embarrassment, oppression, undue burden or expense." Schwarzer, Tashima & Wagstaffe, Fed. Civ. Proc. Before Triai ¶ 11:84 (2001). Factors for determining the existence of good cause include whether the information is sought for a legitimate purpose, whether disclosure will violate any privacy interest, whether disclosure will cause a party embarrassment, whether disclosure is important to public health and safety, whether sharing of information among litigants will promote fairness and efficiency in the litigation, and whether the case involves issues of public importance. *Id.* ¶ 11:89.1. The court must balance the interests in allowing discovery against the relative burdens to the parties. *Id.* ¶ 11:90. At issue here are two categories of questions – background questions such as where plaintiffs were born and married, and questions related to the after-acquired-evidence doctrine such as whether or not plaintiffs may legally work in the United States.

1. Background Questions

A. Place of Birth

NIBCO seeks to ask each plaintiff where s/he was born. Although each plaintiff has responded through interrogatories identifying their national origin (i.e., of "Mexican Ancestry" for plaintiff Rivera), NIBCO contends where each plaintiff was born is still nevertheless relevant, citing to *Espinoza v.*

Farah Mfg. Co., 414 U.S. 86, 88 (1973): "'national origin' in Title VII refers to 'the country where a person was born, or more broadly, the country from which his or her ancestors came.'" NIBCO further refers to the fact that this question is set forth as a form interrogatory by the Judicial Council of California.

Plaintiffs contend such questions bearing upon plaintiffs' immigration status have a chilling effect upon plaintiffs and similarly situated individuals pursuing their workplace rights. This Court agrees. Insofar as there appears to be no dispute that each plaintiff is a member of a protected class, and further questions regarding where each plaintiff was born has no further relevance to this action, plaintiffs' request that NIBCO be precluded from asking such questions is hereby GRANTED. *See Botello v. County of Alameda*, 1995 U.S. Dist. LEXIS 19532, 119 WL 779115, *4 (N.D. Cal. 1995).

B. Place of Marriage

NIBCO seeks to ask plaintiffs where they were married, citing the marital privilege and issues of credibility as to its possible relevance. *See Haddad v. Lockheed*, 720 F.2d 1454 (9th Cir. 1983) (marital privilege sought in discrimination case). Plaintiffs concede this question, along with each plaintiff's educational background, current and past employment, damages, date of birth, other names used, and criminal convictions may be relevant, and accordingly request such matters be subject to a "limitation on its disclosure to anyone other than the parties, their attorneys, and agents (including experts)." P&A 9:18-21 and P&A Exh. B. Insofar as plaintiffs' proposed limitation as to these topics appears to satisfy NIBCO's need and use for such information, and NIBCO has not objected to this proposal in their opposition, plaintiffs' motion is GRANTED as to these items.

2. Employment Status

NIBCO seeks to inquire into plaintiffs' respective past and present employment status. NIBCO concedes, only for purposes of this motion, that Title VII applies to

undocumented aliens. NIBCO Oppo. P&A 12 n.17; see also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 n.10 (9th Cir. 1989) (court found persuasive, without ruling on issue, EEOC's argument that Title VII applies to undocumented aliens), *overruled on other grounds*, *Burrell v. Star Nursery*, Inc., 170 F.3d 951 (9th Cir. 1999), *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991) (Title VII extends protection to undocumented workers), and *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 849 (1998) (FEHA applies to undocumented aliens). NIBCO seeks such information for purposes of the "after acquired evidence" doctrine, which could limit a plaintiff's damages and preclude reinstatement.[1] Plaintiffs, in turn, concede the application of this doctrine, but contend NIBCO must obtain such evidence through other means rather than from plaintiffs directly through discovery.

Other courts have similarly struggled with the application of the after acquired evidence doctrine. *See*, *i.e.*, *Mardell v. Harleysville Life Ins.*, 31 F.3d 1221, 1226-28 (3d Cir. 1994) (discussion of different treatments by different circuits), vacated, 514 U.S. 1034 (1995), on remand, 65 F.3d 1072 (per curiam). In most such cases, however, the defendant-employer's method of discovering such evidence was not in dispute. *See Murillo*, 65 C.A.4th at 839 (plaintiff volunteered at deposition she was undocumented); *cf. Tortilleria*, 758 F.

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[1] NIBCO cites to 8 U.S.C. § 1324a in support of their position regarding reinstatement and in support of counsel's position that he has an obligation to protect his client from criminal exposure. Oppo. P&A 3:17-23, 3:26-27, 15:2-5, and 15:21-25. With respect to the latter, section 1324a only subjects an employer to criminal exposure if the employer knowingly hires an alien who is unauthorized to work in the United States. As noted by plaintiffs, § 1324b(a)(6) limits an employer from requesting further documents which establish employability. Also, § 1324a(b) says nothing about allowing an employer to investigate an employee's immigration status through the civil discovery process.

Supp. at 586 (plaintiff refused to respond to discovery regarding her immigration status for purposes of whether or not Title VII applied to undocumented workers).

At tension here are the possible and alleged misdeeds by both parties. Plaintiffs argue, which NIBCO and this Court accept for purposes of this motion, that Title VII nevertheless offers protection to employees without such documentation. As NIBCO points out, it is illegal for an individual to work without the proper documentation. Plaintiffs and the Court acknowledge that such evidence is relevant.

In reaching a resolution to this issue, the Court compares an employee's fraud during the application for employment (application fraud) with the employee's fraud during employment (resume fraud). With regard to the former, of which the instant case is allegedly an example, the applicant is qualified to do the job, but, had the employer known of the fraud, the applicant would not have been hired. With regard to the latter, the applicant was not qualified to do the job but, due to the applicant's fraud, was nevertheless hired.

Mardell, a pre-*McKennon* case (*McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995)), addressed the fairness of allowing an employer to find and to use after acquired evidence for purposes of precluding or capping the employee's damages. *Mardell* noted that allowing an employer to escape liability altogether after discovering a legitimate reason for terminating that employee would be tantamount to awarding the employer for engaging in the discriminatory wrongdoing. 31 F.3d at 1229-30. *Mardell* found such a result was ruled out by the language of Title VII, which granted standing to "any individual" rather than "any qualified individual". 31 F.3d at 1231. However, like *McKennon*, *Mardell* held: "The plaintiff's deceit or misconduct toward the employer is most appropriately considered in the remedies stage . . . ." 31 F.3d at 1233. In comparison to *McKennon*, *Mardell* was quicker to realize the chilling effect upon potential discrimination claims that an

employer's "thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct" would bring. 31 F.3d at 1236. Although *Mardell* did not discuss the manner in which such evidence was acquired, *Mardell* did voice concerns that such evidence would have the stain of retaliation. 31 F.3d at 1238 n.31.

In *Massey v. Trump's Castle*, 828 F. Supp. 314, 321 (D.N.J. 1993), the court noted the Eleventh Circuit's analysis that after acquired evidence penalizes the wronged employee twice because such "evidence would not have been discovered had the employer not discriminated against the employee [to begin with]." 828 F. Supp. at 321. *Massey* allowed back-pay damages, in an after acquired evidence case, through the time of judgment rather than the time of discovery because "the fact that the misconduct was discovered only as a byproduct of the employer's illegal actions cannot be minimized or overlooked." 828 F. Supp. at 323-24. However, if the employer could "prove that the information would have inevitably come to light independent of the employer's discriminatory conduct", *Massey* would then allow damages only through the date of inevitable discovery. 828 F. Supp. at 324 (emphasis added).

This Court adopts the reasoning of *Massey* for purposes of discovery, i.e., defendants may engage in independent investigation regarding plaintiffs' immigration status but may not ask plaintiffs such questions directly. As noted by plaintiffs and in Massey, such investigation should have been done at the time of hiring, not post-discrimination. 828 F. Supp. at 322 n.10. The defendant-employer is not placed in an adverse position because but for the lawsuit the employer never would have had reason to pursue such an inquiry.

The Court finds this resolution consistent with *McKennon*. In *McKennon*, the plaintiff-employee brought an action alleging discrimination based on age. At plaintiff's deposition she disclosed that she had wrongfully copied confidential documents which would have otherwise resulted

in her termination. The Supreme Court held that in such cases "neither reinstatement nor front pay is an appropriate remedy" and further held backpay damages would terminate on the date the information at issue was acquired. 513 U.S. at 362. The Supreme Court further abrogated the inevitable discovery rule, as opposed to acquiring such information during the course of discovery, as set forth in *Massey*. *Id.* However, *McKennon* did not address application fraud committed by undocumented aliens. Further, *McKennon* has afforded lower courts some discretion in crafting a resolution to cases with different facts: "The concern that employers might as a routine matter undertake extensive discovery into an employee's background . . . to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney's fees . . . and to invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses." 513 U.S. at 363 (emphasis added).

This Court agrees with *McKennon*'s suggestion that "the authority of the courts to award attorney's fees . . . will deter most abuses" for cases involving resume fraud and cases like McKennon where the plaintiff-employee has engaged in wrongdoing warranting termination after being hired. The chilling effect that discovery into backgrounds of such employees bringing a Title VII action has is limited insofar as those employees merely face a cap on damages. Unlike employees who have committed application fraud or engaged in wrongdoing while employed, however, undocumented employees face a much more serious ramification from background discovery – possible deportment and criminal prosecution. Accordingly, based on this reasoning and based on the partial immunity granted to undocumented employees regarding their standing to bring a Title VII claim as granted by Hacienda Hotel and Tortilleria, this Court does avail itself to the appropriate provisions of the Federal Rules of Civil Procedure to GRANT plaintiffs' motion for protective order regarding questions related to their documented status. As stated supra, employers have an opportunity to investigate

this during the time of application. While a defendant-employer may certainly independently investigate a plaintiff-employee's immigration status, the Court declines to sanction such investigation to include the use of the discovery process from the plaintiff directly.

DATED: June 19, 2001

SANDRA M. SNYDER,

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MARTHA RIVERA, et al.,	)CV F 99-6443 AWI SMS
	)
Plaintiffs,	)ORDER ENTERING
	)FINDINGS AS TO
v.	)DEC. 21, 2001 ORDER
	)AND GRANTING MOTION
NIBCO, INC., et al.,	)TO CERTIFY ORDER FOR
	)INTERLOCUTORY APPEAL
Defendants.	)

This is an employment discrimination action. On June 18, 2001, the Magistrate Judge entered an Order Granting Plaintiff's Motion for Protective Order. Defendants filed a motion for reconsideration for the Magistrate Judge's order, which the court denied in an order entered December 21, 2001. Defendants now move for an order amending the order of December 21, 2001, to state that the order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Defendants also move the court to certify the amended order for interlocutory appeal pursuant to 28 U.S.C. section 1292(b).

The controlling statute, 28 U.S.C. 1292(b) provides as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

> materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge there of shall order.

In *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) the Court of Appeals for the Ninth Circuit held that the certification requirements of the statute are "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation."

"[A]ll that mush be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Id.* The court find that in the present case, the court's order of December 21, 2001, addresses the issue of to what extent Defendants can determine each Plaintiff's potential remedies in this case through the discovery process. The outcome of this issue affects the remedies to which Plaintiffs may be entitled should they prevail. The court finds, therefore, that the resolution of the issue could materially affect the outcome of this litigation.

The court further finds that there is substantial ground for a difference of opinion in this case. Specifically, there is no Ninth Circuit authority addressing the issue of whether the Immigration Reform and Control Act ("IRCA") prohibits defendants from inquiring into the legality of plaintiffs' working in the United States through the civil discovery process and whether the IRAC prohibits Defendants from

applying the after-acquired evidence doctrine to determine Plaintiffs' legal remedies.

Finally, the court finds that an immediate appeal of the court's order of December 21, 2001, will speed the final resolution of this lawsuit. The resolution of the issues in dispute will determine Plaintiffs' ability to recover on their claims for front pay and reinstatement, one of their primary claims in this action. Thus, resolution of the issues will greatly facilitate the efficient handling of this case. Further, Defendants estimate that the trial in this case will last three to four months, and anticipate appealing the court's Order of December 21, 2001, after final judgment, if necessary. In the event that the Court of Appeals reverses this court's decision, discovery will have to be reopened and a significant amount of time and resources will have been wasted in trying the case. Finally, Defendants' suggest that appellate resolution of the extent that they can inquire about Plaintiffs' alleged damages could encourage settlement.

Based on the foregoing, the court HEREBY CERTIFIES its December 21, 2001 order for interlocutory appeal pursuant to 28 U.S.C. section 1292(b). The court denies as moot Defendants' request to amend the order of December 21, 2001.

IT IS SO ORDERED.

DATED: _____ _____

ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTHA RIVERA; et al.,	)	No. 02-88046
	)	
Plaintiffs – Respondents,	)	D.C. No. CV-99-
	)	06443-WAI
v.	)	Eastern California
	)	(Fresno)
NIBCO, INC., an Indiana corp.,	)	
	)	ORDER
Defendant - Petitioner.	)	
	)	

Before: BROWNING, KOZINSKI and RYMER, Circuit Judges

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioner shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. 2000e-5(g)(1) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

8 U.S.C. 1324a(a) provides, in relevant part:

> (1) In general. It is unlawful for a person or other entity (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, * * *.
>
> (2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an

unauthorized alien with respect to such employment.

8 U.S.C. 1324a(h)(3) provides, in relevant part:

> [T]he term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

8 U.S.C. 1324c(a) provides, in relevant part:

It is unlawful for any person or entity knowingly—

> (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act,
>
> (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or to obtain a benefit under this Act,
>
> (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act or obtaining a benefit under this Act * * *.

(2)

No. 04-936

Supreme Court, U.S.
FILED
JAN 31 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NIBCO, INC.,
Petitioner,

v.

MARTHA RIVERA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Ninth Circuit's interlocutory ruling that the magistrate judge's fact-specific, discretionary discovery order was not "clearly erroneous" or "contrary to law"?

2. Should this Court grant certiorari to review language in the decision below that petitioner concedes is dicta, particularly where the issue has not yet been considered by any other court of appeals?

LIST OF PARTIES

Respondents adopt petitioner's "Parties to the Proceeding Below," except that due to typographical errors below, "Eva Ariola" should appear as "Eva Arriola," and "Maria Domitilia Medina" should appear as "Maria Medina."

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IN THE

Supreme Court of the United States

No. 04-936

NIBCO, INC.,

Petitioner,

v.

MARTHA RIVERA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the California Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* Respondents Martha Rivera et al. are 23 Latina and Southeast Asian former employees of petitioner NIBCO, Inc. Their complaint states that petitioner terminated them because they were unable to pass tests that were administered only in English and unsupported by business necessity. Respondents allege that these terminations adversely impacted them on the basis of their national origin.

The facts giving rise to the matter at bar are straightforward. At the very outset of respondent Martha Rivera's deposition on May 14, 2001, petitioner's counsel asked and insisted upon answers to questions potentially relating to her

immigration status. Those questions included, among other things, where her marriage ceremony was performed and her place of birth. Petitioner's counsel also stated that he intended to ask other such questions of Ms. Rivera, such as her length of residence in the United States. Ct. App. Excerpts of Record ("ER") 0047-56. Respondents' counsel objected to, and ultimately instructed Ms. Rivera not to answer, those questions on the ground that they were irrelevant and potentially prejudicial. ER 0048-50, 0056. As a compromise, respondents' counsel proposed that the parties stipulate *inter alia* that any immigration-related testimony would be used solely for purposes of the litigation, would not be disclosed to third parties, and would not be used to terminate any respondent's current employment. ER 0048-51, 0059-64. Petitioner's counsel rejected that proposal, and also indicated that he intended to ask all respondents the same questions during their depositions. ER 0051-57.

Respondents' counsel thereupon adjourned the deposition to seek a protective order pursuant to Fed.R.Civ.P. 26(c) barring certain immigration-related questions and restricting the disclosure of respondents' testimony on questions not directly related to, but nonetheless potentially probative of, their immigration status. ER 0056-58, 0065-83, 0110-183. The magistrate judge granted a protective order on June 18, 2001. *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647 (E.D. Cal. 2001); Pet. App. 60a-69a. The district judge twice upheld the protective order, finding that it was not "clearly erroneous or contrary to law" pursuant to Fed.R.Civ.P. 72(a). *Rivera v. NIBCO, Inc.*, 2001 WL 1688880, *2 (E.D. Cal. Dec. 21, 2001); Pet. App. 55a-59a (order denying reconsideration on December 21, 2001); ER 0430 (orally denying reconsideration on April 22, 2002). In view of this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) ("*Hoffman*"), however, the district judge certified the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on May 2, 2002. Pet. App. 70a-72a. The Court of

Appeals for the Ninth Circuit granted permission for the appeal on August 6, 2002. Pet. App. 73a. Subsequently, on September 17, 2002, the district court granted petitioner's motion to stay virtually all proceedings pending the appeal, and vacated all pretrial and trial dates. ER 0483.[1]

On appeal, petitioner argued that *Hoffman*, which disallowed backpay awards to undocumented workers under the National Labor Relations Act, mandated the unfettered discovery it sought. Specifically, petitioner asked the Ninth Circuit to find that *Hoffman* extended to Title VII to deny backpay to undocumented workers who had been subjected to unlawful discrimination. Petitioner moreover asserted that *Hoffman* should be understood to *require* the district court to order unrestricted discovery propounded for the stated purpose of determining respondents' entitlement to backpay, entirely irrespective of any harm to the respondents caused thereby. Pet. App 13a.

Employing the same standard of review applied by the district court, the Ninth Circuit determined that the magistrate judge did not exceed her discretion in finding that the sensitive nature of such discovery (at least at the liability phase) could have a chilling effect upon respondents that was likely to deter them from enforcing their rights under Title VII. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); Pet. App. 1a-29a. In a unanimous opinion, the court observed:

> Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or

---

[1] After the Ninth Circuit denied rehearing and rehearing en banc on September 20, 2004, respondents sought and were granted a trial date. Petitioner, however, has informed the district court that it will seek to have the stay reimposed if certiorari is granted.

> undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.

Pet. App. 10a. Accordingly, the court expressed substantial concerns about a per se rule requiring the district courts to grant such discovery in all instances, or eliminating a district court's discretion to fashion appropriate protective orders in all cases where immigration-related discovery was propounded.

Notably, despite petitioner's invitation to do so, the court below expressly declined to decide whether *Hoffman*'s reasoning should be extended to Title VII. Although it responded in detail to petitioner's contentions in this regard, Pet. App. 12a-18a, it ultimately concluded:

> We need not decide the *Hoffman* question in this case, however. Regardless whether *Hoffman* applies in Title VII cases, it is clear that it does not *require* a district court to allow the discovery sought here. No backpay award has been authorized in this litigation. Indeed, the plaintiffs have proposed several options for ensuring that, whether or not *Hoffman* applies, no award of backpay is given to any undocumented alien in this proceeding. Thus, the very problem NIBCO has identified may well never arise here.
>
> Perhaps even more important, . . . [t]he information NIBCO seeks is not relevant to determining whether it has violated Title VII. . . .
>
> The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of statutory relief. NIBCO's contention that discovery regarding the plaintiffs' immigration status is essential to

> its defense is therefore without merit. Accordingly, we hold that the district court did not err when it declined to modify the protective order.

Pet. App. 18a-19a. Thus, the court explicitly declined to reach a conclusion about the availability of backpay to undocumented Title VII plaintiffs following *Hoffman*. To the contrary, the court indicated that its responses to petitioner's argument in that regard were dicta. It observed only that *Hoffman* was not relevant to the issue of petitioner's *liability*, and that the discovery sought was therefore not essential to its defense. *Id.*

Nor did the Ninth Circuit hold that immigration-related discovery could never be obtained in Title VII actions. Although it rejected petitioner's claim that *Hoffman* mandated unrestricted discovery into immigration status, the court deferred the question of whether such information could be considered in post-liability proceedings to determine the extent of backpay. Noting that respondents had proposed options that would allow for their immigration status to be disclosed *in camera*, the court left it to the district court to fashion, if needed, such procedures that would obviate any potential conflict with *Hoffman*, yet would not undermine respondents' ability to pursue their rights under Title VII. Pet. App. 5a-6a, 18a-19a, 28a.

In summary, the court below determined that the magistrate judge did not abuse her discretion in making the fact-specific finding that the requested discovery would have a serious chilling effect upon the respondents. Nor did she abuse her discretion, the court concluded, in making the equally fact-specific determination that the negative consequences of this chilling effect would not be offset by any overriding need of petitioner to conduct such discovery prior to trial. Consequently, the court held that the magistrate judge's balancing of benefits and harms pursuant to Fed.

R.Civ.P. 26, and the resulting protective order, were "neither clearly erroneous nor contrary to law." Pet. App. 28a.

In a concurring opinion, Senior Circuit Judge Eugene E. Siler, Jr.[2] noted that because of the highly deferential standard of review applicable to the district court's discretionary resolution of this discovery issue, he "might very well affirm any appeal by the plaintiffs for a denial of the protective order on the same basis, that is, the ruling was not clearly erroneous or contrary to law." Pet. App. 28a-29a.

The Ninth Circuit subsequently denied rehearing and rehearing en banc. *Rivera v. NIBCO, Inc.*, 384 F.3d 822 (9th Cir. 2004); Pet. App. 30a-54a. Petitioner now seeks certiorari.

REASONS FOR DENYING THE PETITION

The decision below is poorly suited for review by this Court because it concerns a fact-bound discovery matter, committed to the sound discretion of the district court, that reached the court of appeals only by way of interlocutory appeal. Review is also inappropriate to the extent that petitioner invites the Court, on the basis of admitted dicta, to comment on a legal issue that has not been the subject of a holding of any court of appeals. For these reasons, the petition should be denied.

I. CERTIORARI FOR INTERLOCUTORY DISCOVERY ORDERS IS HIGHLY DISFAVORED.

As a threshold consideration, it has long been settled that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of

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[2] Judge Siler, of the Court of Appeals for the Sixth Circuit, sat by designation.

the cause." *American Construction Co. v. Jacksonville T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). Indeed, the interlocutory nature of the matter may "of itself alone" be a sufficient reason to deny certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). As this Court has noted:

> An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Johnson v. Jones, 515 U.S. 304, 309 (1995). The foregoing considerations are especially applicable with respect to pretrial discovery rulings, immediate review of which is "not ordinarily available," *Kerr v. United States District Court*, 426 U.S. 394, 402-02 (1976), and is "generally denied." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (citing *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), and *United States v. Ryan*, 402 U.S. 530, 533 (1971)); *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (discovery order generally not a "final order" subject to appellate review). *See also Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 232 (1979) (Rehnquist, J., concurring) ("[O]ur cases and those of the Courts of Appeals hold that review of the granting or denial of discovery is not immediately reviewable, except perhaps by way of mandamus for gross abuse of discretion on the part of the trial court").

Accordingly, certiorari with respect to interlocutory discovery matters is typically granted only in unusual circumstances. *See, e.g., United States v. Nixon*, 418 U.S. 683, 690-

92 (1974) (certiorari granted, upon interlocutory appeal and petition for mandamus relief from discovery ruling, because of Court's reluctance to require the President to place himself in contempt as condition for review); *Cheney v. United States District Court*, 540 U.S. ___, 124 S.Ct. 2576, 2587 (2004) (certiorari granted from discovery ruling where substantial potential intrusions upon Executive privilege were alleged, "remov[ing] this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable").

In the instant case, there is nothing that overcomes the strong presumption against interlocutory review. Should this matter—which has already been stayed by the district court for more than two years due to the pendency of this appeal before the Ninth Circuit—eventually proceed to trial, petitioner will suffer no imaginable harm that could not be entirely remedied on appeal from a final judgment. In the event that petitioner were successfully to challenge an adverse judgment on the basis that it should have been permitted to discover respondents' immigration status prior to trial, and thereby avoid either liability under the supplemental state law claims or entry of all or part of a monetary award, [3] that judgment would readily be modified via remittitur.

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[3] Specifically, petitioner contends that a showing that some of the respondents were undocumented at the relevant times could enable it to limit its backpay liability to them should *Hoffman* be found to apply to Title VII cases, 364 F.3d at 1062, 1070, or to defend against respondents' state law claims in their entirety, *id.* at 1072-73. But it is unclear why these issues—which have not been decided by any court in this action—would not be adjudicated by the district court in the first instance and without the necessity of any appeal from the judgment, utilizing mechanisms such as the post-trial in camera procedure referenced by the Ninth Circuit, *id.* at 1070, 1075. (This point is also discussed briefly at Section II.B, *infra.*) In any event, denial of interlocutory certiorari does not prejudice a party's ability to seek certiorari as to the same matters after the final judgment. *Hamilton-Brown Shoe Co., supra,* 240 U.S. at 259.

Alternatively, if petitioner is not found liable for any federal or state law violation, the potential need for the discovery sought by petitioners would be entirely obviated.

Especially in light of the prejudice to respondents of still further delay before their claims are finally heard, and because this appeal may turn out to be an unnecessary burden on judicial resources, this case is not appropriate for review at this premature stage. Petitioner presents no reason to depart from this Court's well-established presumption against hearing matters prior to a final judgment.

II. BECAUSE THE MAGISTRATE JUDGE'S ORDER WAS NOT "CLEARLY ERRONEOUS," "CONTRARY TO LAW," OR AN ABUSE OF DISCRETION, REVIEW WOULD BE INAPPROPRIATE.

Under 28 U.S.C. § 636(b)(1)(A), a magistrate judge's pretrial order may be reconsidered by the district court "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *See also* Fed.R.Civ.P. 72(a). The Ninth Circuit employs the same standard when reviewing a district court's denial of a motion to reconsider such an order. *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (affirming district court's refusal to reconsider magistrate judge's protective order, and noting "the very broad discretion of the district courts" to enter such orders); *see also Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001) (reviewing district court's discovery and evidentiary orders for abuse of discretion).

The deferential level of review accorded district courts' discovery orders was explained by this Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984):

> [W]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent

> 'equitable power of courts of law over their own process, to prevent abuses, oppression, and injustices'. [citation omitted]
>
> . . .
>
> To be sure, Rule 26(c) confers broad discretion on the trial court to determine when a protective order is appropriate and what degree of protection is required. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

Id. at 35-36. *See also Brandt v. Wand Partners*, 242 F.3d 6, 18 (1st Cir. 2001) ("Discovery decisions by the . . . district court are reviewed for abuse of discretion, and the discretion in this area is very broad, recognizing that an appeals court simply cannot manage the intricate process of discovery from a distance."); 8 C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2036, p. 489 (2d ed. 1994, Supp. 2004) ("a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of [Rule 26(c)]").

This, of course, is in keeping with "the principle that an appellate court reviews questions of law and may not substitute its own view of the facts or make new fact-findings. . . . Whether the fact issues in the trial court are determined by a jury or a judge, the appellate court limits itself to questioning whether there is a substantial evidentiary basis for the determinations." F. JAMES & G. HAZARD, CIVIL PROCEDURE 667 (3d ed. 1985). *See also* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As described below, the Ninth Circuit properly concluded that the district court's factual findings were not clearly erroneous. Nor was the district court's ruling contrary to law. Certiorari should therefore be denied.

A. The Ninth Circuit Held Simply That The Magistrate Judge's Fact-Based Rule 26 Balancing Was Not "Clearly Erroneous."

Despite petitioner's effort to characterize the opinion below as a wholesale departure from settled legal precedent, it is nothing of the sort. Quite to the contrary, the core holding of the court below was simply its determination, under the applicable standard of review, that the magistrate judge did not "clearly err" in granting the protective order at issue. Lacking any basis for finding an abuse of discretion, the Ninth Circuit let stand the magistrate judge's intrinsically factual balancing of the harms and benefits of the proposed discovery. As the court summarized:

> In this case, the protective order was justified because the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights—outweighed NIBCO's interests in obtaining the information at this early stage in the litigation. We therefore hold that the district court's decision not to disturb the order was neither erroneous nor contrary to law.

364 F.3d at 1064. Accordingly, the Ninth Circuit held only that the district judge's decision not to reject the magistrate judge's Rule 26 balancing analysis was not an abuse of discretion.

In sum, the district court undertook the assessment, pursuant to Rule 26's required balancing of harms against benefits, that it was best positioned to conduct. It weighed petitioner's particularized arguments concerning its need for

the information, *see, e.g.*, Pet. App. 63a-66a, ER 0084-0109, against the chilling effect that such discovery would have upon the respondents in this case and their ability to press forward with their discrimination claims.[4] Properly applying a deferential level of review, the Ninth Circuit found no clear error in that assessment. Respondent's disagreement with the district court's result, without more, hardly compels the conclusion that the district court "clearly erred." *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ('clearly erroneous' standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."). To the contrary, the fact that unscrupulous employers may retaliate against complaining workers by using their undocumented status against them is well

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[4] Federal courts have long recognized that discovery into a plaintiff's immigration status may exert a powerfully intimidating effect that would substantially burden her ability to enforce her workplace rights. Accordingly, these courts have held that immigration-related discovery may properly be limited in order to strike an appropriate balance between the parties' interests. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom. Griffin & Brand of McAllen v. Reyes*, 487 U.S. 1235 (1988) (denying discovery concerning plaintiffs' immigration status, noting that such discovery could inhibit their pursuit of their legal rights "because of possible collateral wholly unrelated consequences"); *Montelongo v. Meese*, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (district court barred inquiry into class members' immigration status); *John Dory Boat Works, Inc.*, 229 N.L.R.B. 844, 852 (1977) (National Labor Relations Board ("NLRB") enjoined employer from calling employees' immigration status into question, noting that the impact upon witnesses of immigration-related questioning at Board proceeding "ranged from unsettling to devastating and certainly affected their ability to testify."). *See also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-71 (9th Cir. 2000) (permitting plaintiffs to proceed anonymously, and noting that "complaining employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies", and that "[a]s guest workers in Saipan, plaintiffs may be deported if they lose their jobs.").

established.[5] Moreover, for reasons essentially identical to those cited by the district court herein, the majority of post-*Hoffman* cases considering the discovery issue have likewise denied employers' attempts to ascertain plaintiffs' immigration status.[6] Though not determinative, these cases sug-

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[5] *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (undocumented workers voting in favor of union representation reported by employer to the Immigration and Naturalization Service ("INS")); *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) (undocumented workers active in union organizing effort fired and reported to the INS); *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1125 (7th Cir. 1987) (enforcing NLRB order finding unlawful employer threats to report organizing workers to the INS); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998) (employer reported undocumented plaintiff to the INS immediately after first state agency proceeding concerning her claim for unpaid wages, resulting in her arrest and detention); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002) (employer had undocumented plaintiff detained by INS for fourteen months in retaliation for filing wage claim). *See also* Nancy Cleeland, *Unionizing is Catch 22 for Illegal Immigrants' Jobs: Undocumented Status Makes Them Vulnerable to Workplace Retaliation*, LOS ANGELES TIMES, Jan. 16, 2000 (available at 2000 WL 2201447).

Other evidence suggests a close correlation between the presence of labor and employment disputes in a workplace and the occurrence of a federal immigration raid. *See* Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. R. LAW & SOC. CHANGE 389, 390-92 (2004) (in New York district of INS, during thirty-month period from 1997 to 1999, 102 of 184 INS-raided businesses were subject to a labor agency investigation or proceeding at the time of the raid).

[6] *See, e.g., EEOC v. First Wireless Group, Inc.*, ___ F.R.D. ___, 2004 WL 2733612, *1-3 (E.D.N.Y. Nov. 19, 2004) (following the opinion below and affirming order denying discovery of charging parties' immigration status); *Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61 (W.D.N.Y. 2003) (rejecting employer attempts to discover plaintiffs' current residences and places of employment, even assuming *arguendo* the relevance of that information, in view of intimidating effect of such discovery); *Cortez v. Medina's Landscaping*, 2002 WL 31175471, *1

gest that the magistrate judge's ruling was not so unreasonable as to be an abuse of discretion.

(N.D. Ill. Sept. 30, 2002) (denying defendant's motion to discover plaintiffs' citizenship status); *Rodriguez v. The Texan, Inc.*, 2002 WL 31061237, *2 (N.D. Ill. Sept. 16, 2002) (granting plaintiffs' motion *in limine* to exclude evidence of their undocumented status for purposes of challenging their entitlement to damages); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (granting Rule 26(c) protective order barring immigration-related questioning); *Flores v. Amigon*, 233 F.Supp.2d 462, 464-65 (E.D.N.Y. 2002) (granting protective order against discovery of immigration status); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, *5 (C.D. Cal. Apr. 9, 2002) (affirming denial of employer's motion to compel production of immigration documents); *Liu v. Donna Karan Intl., Inc.*, 207 F.Supp.2d 191, 192-93 (S.D.N.Y. 2002) (denying discovery of immigration status information).

Consistent with these cases, neither the U.S. Equal Employment Opportunity Commission ("EEOC") nor the NLRB have interpreted *Hoffman* as requiring them to initiate inquiries as to complaining workers' immigration status. *See* EEOC Directives Transmittal No. 915.002, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002) ("When enforcing [the federal employment discrimination statutes], EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."), available at http://www.eeoc.gov/policy/docs/undoc-rescind.html. The EEOC's administrative interpretations of Title VII are "entitled to great deference." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). In the same respect, *see* NLRB General Counsel Memorandum GC 02-06, *Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after Hoffman Plastic Compounds, Inc.* (July 19, 2002) ("Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. . . . The law—IRCA—protects employees against harassment by an employer which seeks to reverify their immigration status without cause."), available at http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc02-06.asp?useShared=/nlrb/legal/gcmemo/gcmemo/default.asp. Rules of the NLRB are accorded "considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

Because the Ninth Circuit properly declined to reconsider the magistrate judge's fact-dependent result, the opinion below is unsuited for certiorari.

B. The Opinion Below Does Not Conflict With The Cases Petitioner Cites.

Try as it might to portray the opinion below as a 'profound subversion' of federal discovery principles (Pet. 2, 5), petitioner cannot do so. Review on such a basis is thus unwarranted as well.

Petitioner first contends that the Ninth Circuit announced the existence of a special "privacy right" inhering in respondents as its basis for affirming the magistrate judge's Rule 26 balancing determination. But respondents have never argued the existence of any "privacy right" as justification for the protective order. Nor did the court below ever mention such a construct, let alone rely on it. (Indeed, the word "privacy" does not appear in the opinion.) Moreover, the cases cited by petitioner discussing the privacy interests calling for Fourth Amendment protection in the criminal context offer no guidance on the scope of protection provided by Fed.R.Civ.P. 26(c) against "annoyance, embarrassment, oppression, or undue burden or expense" in a civil case.

Next, petitioner argues that the magistrate judge could instead have required respondents to respond to pretrial immigration-related discovery subject to a prohibition on the disclosure to third parties of the information gained thereby. Yet petitioner rejected this proposal below. ER 0051-57, 0200. Moreover, although petitioner recites general principles regarding "liberal discovery" and the availability of depositions, it cannot explain why it was *contrary to law* for the court below to find that deferring such discovery until after trial was a superior compromise solution adequately

protecting all parties' interests.[7] Likewise, petitioner's reliance on two First Amendment cases, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) and *Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987), for the asserted proposition that simple non-disclosure orders adequately protect the parties' interests, is misplaced. Neither case involved an order that particular discovery not be had. Instead, they upheld protective orders restricting access to the discovered information to the litigants, rejecting arguments that it should have been released to the general public.

In the same regard, petitioner's characterization of *In re Grand Jury Subpoenas*, 836 F.2d 1468 (4th Cir. 1988), is misleading. In that case, the Fourth Circuit actually recognized the *inadequacy* of non-disclosure orders for insulating witnesses from potential criminal prosecution. *Id.* at 1476-77. *See also Andover Data Services, a Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2d Cir. 1989) (overturning, as insufficient, district court's protective order limiting access to witness's deposition testimony, observing that such measures "provide[ ] no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution.").

Nor does the decision below render *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), "an empty shell," as petitioner charges. As this Court expressly recognized in setting forth the contours of the after-acquired

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[7] The single authority petitioner relies upon in this respect, *CSC Holdings v. Redisi*, 309 F.3d 988, 993-94 (7th Cir. 2002), is unavailing. In that case, the district court had plainly abused its discretion by denying discovery as to a statute of limitations question at "the heart of [the defendants'] defense" which, if borne out, would have relieved them of all liability therein. By comparison, as the court below pointed out, the discovery petitioner seeks here not only is *not* potentially dispositive, it bears upon *no* aspect of petitioner's liability.

evidence doctrine, "The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the [ADEA] is not an insubstantial one." *Id.* at 363. The Court also stated that the after-acquired evidence doctrine should be applied flexibly in the event that "extraordinary equitable circumstances" so dictate. *Id.* at 362. [8] *McKennon* therefore instructed the district courts to invoke the Federal Rules as needed to address those concerns—precisely as the Ninth Circuit found that the magistrate judge appropriately did in this case.[9]

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[8] The EEOC, in its administrative guidance on *McKennon*, has reiterated this concern. *EEOC Enforcement Guidance on After Acquired Evidence and McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 65 E.P.D. Par. 43, 368 (1995)*, No. 915.002 (Dec. 14, 1995) ("Launching a retaliatory investigation of a [charging party's] background in response to a charge or complaint of discrimination is one such equitable circumstance [of the type noted by *McKennon* as warranting flexible application of the doctrine].").

[9] *McKennon's* concern in this regard is echoed by the many courts that have expressly criticized employers' use of overbroad discovery in pursuit of after-acquired evidence. As the Third Circuit observed:

> [T]he efficacy of the after-acquired evidence tactic has not escaped the attention of defense counsel . . . The prospect of a defendant's thorough inquiry into the details of a plaintiff's pre- and post-hiring conduct . . . may chill the enthusiasm and frequency with which employment discrimination claims are pursued, even in cases where the victim of discrimination has nothing to hide, let alone cases where the potential plaintiff is not entirely blameless. . . . [T]he likely consequence of the widespread exploitation of after-acquired evidence will be underenforcement of Title VII and ADEA, and consequently underdeterrence of discriminatory employment practices.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1236 (3d Cir. 1994), *cert. granted, judgment vacated, and remanded, Harleysville Life Ins. Co. v. Mardell*, 514 U.S. 1034 (1995), *opinion reinstated in pertinent part by Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995). *See also Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280

Nothing in the opinion below, therefore, conflicts with *McKennon*. Petitioner's argument essentially reduces to a complaint that the Ninth Circuit declined to view *McKennon* as amounting to a blank check to conduct discovery whenever a defendant merely asserts that such discovery could conceivably turn up facts mitigating its backpay exposure. By its own terms, however, *McKennon* has never stood for such a proposition. That facts constituting after-acquired evidence may 'typically' be acquired during discovery hardly compels the remarkable *non sequitur* that *any* discovery, no matter how invasive or lacking in any specific basis, must therefore be permitted. Indeed, petitioner has not cited a single court of appeals case holding that *McKennon* mandates discovery regarding potential employee wrongdoing, or eliminates the discretion of the district courts under Fed.R. Civ.P. 26 to fashion protective orders where appropriate.

In addition, petitioner argues against bifurcating liability from remedies proceedings. It conclusorily states that "[a]ny collateral consequence of dissuading illegal aliens from

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F.3d 1110, 1116 (7th Cir. 2002) (discussing instances where doctrine "might give employers an incentive to dig for dirt in the litigation process in order to deter suits."); *Washington v. Lake County*, 969 F.2d 250, 255 (7th Cir. 1992) (approving of application of doctrine so as to "weaken[ ] the incentive for an employer to engage in a fishing expedition"); *Miller v. AT&T*, 83 F.Supp.2d 700, 706 (S.D. W.Va. 2000) ("Even if the after-acquired evidence doctrine applies, it is not intended to be used as a fishing expedition by employers to find wrongful conduct on the part of their terminated employees for the purpose of limiting their damages."); *Perry v. Best Lock Corp.*, 1999 WL 33494858, *3 (S.D. Ind. Jan. 21, 1999) ("[The employer] has not provided any information suggesting it has a specific basis for believing that an after-acquired defense might be developed here. . . . On this record, therefore, the subpoenas look like nothing more than a fishing expedition, or, more accurately, an exercise in swamp-dredging and muck-raking.") (emphasis in original). *See also Dodge v. Hunt Petroleum Corp.*, 1998 WL 355495, *1 (N.D. Tex. June 26, 1998) (broad scope of defendant's efforts to discover after-acquired evidence may support inference of retaliatory purpose).

bringing suit under such a regime would be *no different* than if the discovery were provided at the outset," and that "there is no logical justification for ruling that the discovery of plaintiffs' immigration status should be permitted eventually but *deferred* until post trial." (emphases in original) Pet. 13. Petitioner, however, offers no authority to support its categorical, generalized assertions regarding the supposed 'illogic' of bifurcation.[10] Likewise, petitioner argues against

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[10] Many courts have approved of bifurcating the liability and damages phases of a trial where sensitive and potentially prejudicial after-acquired evidence has been involved. *See, e.g., Mardell v. Harleysville Life Ins. Co., supra,* 65 F.3d at 1074 ("bifurcation may sometimes be advisable as a vehicle to ensure that after-acquired evidence not be improperly used during the liability phase"); *EEOC v. Fargo Assembly Co.*, 142 F.Supp.2d 1160, 1165 (D. N.D. 2000) ("Bifurcation is appropriate in a true McKennon situation because, while subsequently-obtained evidence or wrongdoing may not be used to prove or disprove liability, it may be relevant to determination of damages."); *Garrett v. Langley Federal Credit Union*, 121 F.Supp.2d 887, 995 (E.D. Va. 2000) (bifurcating due to existence of after-acquired evidence that could mitigate backpay award); *Nyazie v. Kennedy*, 1998 WL 472504, *3 (E.D. Pa. July 27, 1998) (ordering bifurcation and noting that doing so "could substantially shorten the period of trial as a whole" if defendant prevailed on liability, and where testimony of liability witnesses would be irrelevant in damages phase); *Finch v. Hercules Inc.*, 1995 WL 785100, *3 (D. Del. Dec. 22, 1995) (court proposed bifurcating liability from damages so that after-acquired evidence relevant to damages alone would not create "confusion and prejudice" at liability stage).

The relevant administrative guidances of the EEOC and NLRB are consistent with bifurcating liability from remedies determinations so as to limit the introduction of immigration status information to the latter proceedings. *See* EEOC Directives Transmittal No. 915.002, *supra* ("Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge."); NLRB General Counsel Memorandum GC 02-06, *supra* ("The *Hoffman* decision clearly established that an employee's immigration status may become a relevant factor *during the compliance and settlement phases*.") (emphasis supplied). *See also Tuv Taam Corp.*, 340 N.L.R.B. No. 86, 2003 WL 22295361 (N.L.R.B.), *8

bifurcation on the basis of two intermediate California appellate court decisions it suggests renders respondents' immigration status relevant to their standing to sue under state law (Pet. 14-15), notwithstanding statutory provisions to the contrary.[11] The mere existence of this untested legal theory, however, is not a reason for granting certiorari.

As can be seen, these arguments concerning bifurcation, however conclusory, are arguments that the district court should properly be given an opportunity to address in the first instance. Despite petitioner's suggestion to the contrary, *see, e.g.*, Pet. 13, and as the Ninth Circuit expressly noted in its opinion, the district court did not decide the bifurcation question, but deferred it pending the outcome of the matter on appeal. Pet. App. 6a, 19a. Certiorari implicating this question, which has not yet been addressed by either the district court or court of appeals, and which is quintessentially within the province of the trial court to determine in the first instance, would be ill advised. *See, e.g., Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999)

(2003) (questions regarding immigration status generally must be litgated at compliance, not liability, stage).

[11] *See* CAL. GOV'T CODE § 7285 (establishing that "all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status", and that "[t]he provisions of this section are declaratory of existing law"). Section 7285 also provides that "in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." *Id.*; *see also Hernandez v. Paicius*, 109 Cal.App.4th 452, 460 (Cal. Ct. App. 2003) ("These statutes leave no room for doubt about this state's public policy with regard to the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws. Thus, if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws.").

("The deferential standard by which we review challenges to bifurcation is based on the notion that the district court is in a far better position to assess and attempt to reconcile the competing interests of each party, judicial economy and unfair prejudice.").

For these reasons, petitioner's authorities notwithstanding, the district court did not act in a manner contrary to law. Review on such a basis would be unwarranted.

III. THE DECISION BELOW CREATES NO SPLIT OF AUTHORITY BECAUSE IT IS THE FIRST COURT OF APPEALS OPINION TO ADDRESS *HOFFMAN*, AND BECAUSE THE LANGUAGE PETITIONER POINTS TO IS NOT PART OF THE HOLDING BELOW.

Petitioner invites the Court to use this case as a vehicle for extending the backpay holding of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), to cases arising under Title VII. That invitation should be declined.

A. The Ninth Circuit's Discussion Of *Hoffman*'s Applicability To Title VII Is Express Dicta.

Although petitioner acknowledges that the Ninth Circuit's comments on *Hoffman* and its possible applicability to Title VII were no more than "a lengthy dictum," Pet. 15, or a "suggestion," Pet. 16, it nonetheless urges this Court to grant certiorari to review that dicta.

Petitioner is surely correct in that the observations with which it takes issue are classic dicta. As already noted, the sum total of the Ninth Circuit's holding was simply that even assuming Title VII plaintiffs' immigration status is relevant after *Hoffman*, the district court did not clearly err or act contrary to law in the Rule 26 balancing analysis that led it to grant the protective order. That the opinion also discusses one of petitioner's main contentions on appeal, that *Hoffman*

applies to Title VII cases, should hardly be surprising. But in so doing the court below took pains to note, correctly, that this discussion formed no part of its Rule 26 holding, and that therefore it saw no need to reach the issue. Pet. App. 18a.

Because those observations are not part of the holding below, they are not a proper subject of certiorari. "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (citations omitted). *See also Bunting v. Mellen*, ___ U.S. ___, 124 S.Ct. 1750, 1754 (2004) ("We sit, after all, not to review errors in dicta[.]") (Scalia, J., dissenting).

B. No Other Circuit Has Discussed *Hoffman*, Let Alone Attempted To Interpret It.

The decision below is the only one by any court of appeals to mention *Hoffman* in any more than a passing manner.[12] Petitioner, therefore, cannot allege the existence of an inter-circuit conflict created by the Ninth Circuit's opinion for the simple reason that, at this point in time, there are no other federal appellate treatments of *Hoffman* with which the opinion can conflict.

Indeed, petitioner offers only speculation that future courts of appeal may draw upon language in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998), a pre-*Hoffman* case, in such a manner as to create a conflict with the decision below. The mere possibility that such a conflict might arise at some point in the future, however, is hardly a proper ground for certiorari.

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[12] Just three other court of appeals decisions contain citations to *Hoffman*. None contain any substantive discussion of *Hoffman*. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002) (noting *Hoffman*'s backpay holding); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) (citing *Hoffman* concerning limited jurisdiction of National Labor Relations Board); and *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004) (noting *Hoffman*'s backpay holding).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

NIBCO, Inc.,
Petitioner,

v.

Martha Rivera, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

For several reasons set forth in the petition, the Ninth Circuit's holding – barring discovery of Title VII plaintiffs' immigration status in order to protect plaintiffs' purported interest in preventing exposure of their own illegal activities – merits this Court's review. First, the decision squarely conflicts with other courts of appeals' holdings that relevant discovery should not be denied if a narrower protective order could protect the interests of the party opposing discovery. Pet. 9-11. Second, the court of appeals' holding guts the "after-acquired evidence doctrine" as adopted by this Court in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Pet. 12-13. Third, this case provides an opportunity for this Court to resolve a circuit conflict concerning undocumented workers' Title VII rights and clarify whether its holding in *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 140 (2002), barring undocumented aliens from receiving back pay under the NLRA, extends to Title VII cases. Pet. 15-20. Respondents attempt to harmonize the conflicting opinions of the courts of appeals, and cite purported vehicle problems. None of their arguments are availing.

I. This Case Presents Two Square Circuit Conflicts Meriting This Court's Review.

1. Notwithstanding respondents' contentions, the Ninth Circuit's holding squarely contradicts those of other courts of appeals, and undermines this Court's precedents. The court of appeals held that discovery should be barred to protect respondents' interest in keeping their illegal immigration status private; risk of exposure, it held, would discourage undocumented workers from bringing Title VII claims.[1] But (even

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[1] An interest in keeping information private is plainly one kind of "privacy" interest, and so petitioner uses that term as shorthand for the amorphous interest the court of appeals identified. Furthermore, although the court of appeals obviously did not claim re-

assuming this interest is cognizable), the court's holding that it justifies a *complete bar* on pretrial discovery on this issue is untenable and in conflict with the law of other circuits.

For instance, in *CSC Holdings, Inc.* v. *Redisi*, 309 F.3d 988, 995-96 (2002), the Seventh Circuit held that it was an abuse of discretion for the district court to bar discovery when a more narrowly tailored protective order could adequately protect the interest of the party seeking to bar it. Respondents acknowledge *Redisi* in a footnote, attempting to distinguish it on the ground that immigration status is not dispositive as to the threshold issue of petitioner's liability. But this "distinction" ignores the holding in *Redisi* that petitioner cited, focusing on another part of the opinion. *Redisi* reversed the district court's decision to deny access to information, including cable subscriber lists, that was solely "relevant to [defendants'] efforts to present an alternative and lower calculation of damages" (and therefore "'relevant to the claim or defense of any party'"). *Id.* at 996 (quoting Fed. R. Civ. P. 26(b)(1)).

Other courts of appeals have also held that it is an abuse of discretion for a district court to bar discovery on an issue when more narrowly tailored limitations on discovery or the use or release of discovered information would accomplish the same purpose.[2] For instance, in *Metallgesellschaft* v. *Ho-*

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spondents had a *Fourth Amendment* interest at stake, cases such as *United States* v. *Place*, 462 U.S. 696 (1983), illustrate the point that shielding one's own illegal activity from exposure cannot be considered a legally cognizable interest. Contra BIO 15.

[2] Respondents allege that below, petitioner rejected the option of a protective order barring disclosure. BIO 15. That is false, as is illustrated by the very pages of the record respondents cite. During the deposition, see ER 0051-57, petitioner's counsel *accepted* respondents' counsel's initial request to stipulate to non-disclosure of immigration-related information, declining only to commit his client to ignore the information for employment purposes – a reasonable position, given that knowingly employing an illegal immigrant is a crime carrying a possible prison sentence. Thereafter, respon-

dapp, the Second Circuit held that a district court abused its discretion by denying discovery in a U.S. case on the basis that the information might be used improperly in foreign courts, when the district court could instead have issued a "closely tailored discovery order." 121 F.3d 77, 80 (1997) (following *Euromepa, S.A.* v. *R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (CA2 1995)); accord *In re Bayer AG*, 146 F.3d 188, 194 (3d Cir. 1998) ("Any patent unfairness can be dealt with by the district court crafting an appropriate discovery order."); see *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004) (agreeing with these courts' resolution of the underlying foreign-discoverability issue). The Ninth Circuit's failure to consider the possibility of such an order directly conflicts with these decisions.[3]

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dents successfully sought a total bar on discovery. In its request for reconsideration, petitioner objected to those provisions that "totally barred any deposition discovery relating to" certain elements of claims or defenses, but stated that another provision was "*not objected to* the extent that the ruling *only imposes a limit on disclosure* of that information." *Id.* at 200.

Likewise, respondents' proposed *in camera* proceedings, see BIO 5, were to take place *after* a trial on liability, Pet. App. 5a-6a, and *without petitioners present*, such that petitioners would obtain no information, nor could they cross-examine witnesses or provide rebuttal evidence. And the proposal would not have prevented the jury from using back pay as a partial basis for a punitive damage award, even if the back pay award itself was later struck on the basis of the findings of the *in camera* proceedings.

3 Respondents claim that *In re Grand Jury Subpoena (Under Seal)*, 836 F.2d 1468 (CA4), cert. denied, 487 U.S. 1240 (1988) demonstrates the inadequacy of protective orders. BIO 16. But the single sentence arguably supporting that point states only that the "temporary benefit" of protective measures restricted to the pretrial stage provides no permanent protection – illustrating petitioner's point that postponing discovery until after a trial on liability would not prevent the "chill" the court of appeals cited. 836 F.2d at 1476; see Pet. 13-14. Moreover, that decision's rejection of a protective

2. District courts of course possess considerable discretion over the conduct of discovery. Respondents make much of this fact, attempting to cast the court of appeals' decision as mere deference to the district court's fact-specific determinations. BIO 11-15. But this is a gross mischaracterization: the court of appeals' holding is not merely "fact-specific," BIO 5, but instead creates a sweeping new rule of law that will constrain the discretion of future district courts. Indeed, the court of appeals' opinion places no emphasis at all on the specific facts of the case. Respondents cannot point to a single one of its holdings or statements that would not be equally applicable to *any* dispute concerning discovery of plaintiffs' immigration status in a Title VII case.

Moreover, the opinion's use of boilerplate language concerning the standard of review does not change the fact that its principal holdings are *legal* in nature, look beyond this individual case, refer to "error" rather than "clear error," and do not suggest mere deference to (rather than actual agreement with) the district court. See, *e.g.*, Pet. App. 8a ("In this case, the protective order *was justified* because the substantial and particularized harm of the discovery . . . *outweighed* NIBCO's interests in obtaining the information at this early stage in the litigation."); *id.* 9a ("We *agree with* the district court."); *id.* 10a ("Granting employers the right to inquire into immigration status *in cases like this* would allow them to raise implicitly the threat of deportation [whenever sued]."); *id.* 11a ("The chilling effect *such discovery* could have on the bringing of civil rights actions *unacceptably burdens* the public interest."); *ibid.* ("[T]he national effort to eradicate discrimination in the workplace *would be hampered* by the discovery practices NIBCO seeks to validate here."); *id.* 19a ("[T]he district court *did not err* when it declined to modify the protective order.") (all emphases added). Plainly, district courts

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order was based on considerations specific to the grand jury subpoena context and does not demonstrate that a well-crafted order could not protect respondents' interests here. *Id.* at 1477.

in the Ninth Circuit are not free to ignore these holdings on the grounds that they were merely intended to create room for the exercise of discretion.[4] They are holdings of law, and are appropriate for this Court's review.

To the extent that some of the court of appeals' holdings *are* premised on deference to the district court – principally true of its assessment of the after-acquired evidence issue, see Pet. App. 22a, 24a – this fact does not obviate the circuit split or argue against certiorari. The above-cited cases from other circuits stand for the proposition that denial of discovery on Rule 26(c) grounds when a tailored discovery order could have alleviated the relevant hardships constitutes an abuse of discretion and merits reversal. Moreover, this Court frequently grants certiorari to review court of appeals decisions deferring to district courts' discretionary determinations. See, *e.g.*, *Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2788 (2004).

3. The court of appeals' decision also undermines this Court's decision in *McKennon*. Pet. 12-13. Respondents contend hyperbolically that *McKennon* was not intended to provide a "blank check" to conduct "*any* discovery, no matter how invasive or lacking in any specific basis. BIO 18. But petitioner has not asked for such a blank check, nor "extensive discovery into an employee's background or performance on the job." *McKennon*, 513 U.S. at 363. Petitioner straightforwardly seeks a very basic piece of information – whether plaintiffs may legally work in the United States – that requires no invasive discovery, that is obviously relevant in national origin discrimination cases, and that respondents have no right to keep secret. Respondents' suggestion that it is merely a remote possibility that they might have been ineligible to work makes no sense in light of their "chilling effect" claims: their entire "interest" in avoiding discovery is premised on their being unlawful workers.

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[4] Notably, Judge Siler wrote *separately* to argue that the district court could permissibly have granted discovery. Pet. 28a-29a.

4. This case also provides the opportunity for this Court to resolve confusion in the lower courts regarding the reach of *Hoffman Plastic* and a square conflict among the courts of appeals concerning the extent to which undocumented workers are protected by Title VII. See *SEC* v. *United Ben. Life Ins. Co.*, 387 U.S. 202, 207 (1967) (granting certiorari because of the "the need for clarifying the implications" of a Supreme Court decision); STERN ET AL., SUPREME COURT PRACTICE 235 (8th ed. 2002). It is true that *Hoffman Plastic* has not been extensively addressed by other courts of appeals. But the Ninth Circuit's *holding* concerning discovery (which relies on the weight of respondents' interests in enforcing Title VII rights), as well as its dicta on *Hoffman Plastic*'s application to Title VII, directly conflict with the Fourth Circuit's en banc holding in *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184, cert. denied, 525 U.S. 1142 (1999), that undocumented workers have *no* Title VII rights.[5] This conflict is outcome-determinative, see Pet. 18, and significant, affecting every Title VII case brought by an undocumented worker. Respondents dismiss *Egbuna* as being "pre-*Hoffman*," but do not suggest that *Hoffman Plastic* altered *Egbuna*'s status as good law in the Fourth Circuit. Indeed, *Hoffman Plastic confirmed* that status, since it *limited* and certainly did not enlarge the statutory rights of undocumented workers.

As to the *Hoffman Plastic* back pay issue itself, to be sure, the court of appeals technically avoided reaching the issue, apparently in order to evade this Court's review. In any event, petitioner has not suggested that this Court should grant certiorari *solely* to consider that issue.[6] But this case

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[5] Below, petitioner conceded *arguendo* that Title VII's protections applied to undocumented workers because the Ninth Circuit's law appeared to be settled, see Pet. App. 8a, but this Court is free to consider the question, which is plainly intertwined with the questions presented by the petition.

[6] But see STERN ET AL., *supra*, at 232 ("[C]onflicts in reasoning, even in dicta, . . . may warrant Supreme Court review.").

presents multiple issues worthy of this Court's resolution, and if the Court were to review it, it would certainly be proper for it to resolve the *Hoffman Plastic* issue, since the court of appeals' lengthy dictum would constitute a possible alternate basis for affirmation, is intertwined with the other issues presented here, and was thoroughly litigated below. See, *e.g.*, *Granfinanceria, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989).

This Court should take the opportunity to resolve that issue. Numerous district courts and state courts have addressed the issue of *Hoffman Plastic*'s application to Title VII and other statutes, and have reached conflicting results. Compare Pet. 19-20 (giving examples of cases holding that *Hoffman Plastic* applies) with, *e.g.*, *De La Rosa* v. *N. Harvest Furniture*, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (stating that *Hoffman Plastic* is inapplicable to Title VII) and *Madeira* v. *Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (inapplicable to New York labor law). Further percolation in the lower courts will accomplish little, as no trend toward consensus is apparent, and could harm litigants who alter their litigation strategies based on understandings of *Hoffman Plastic*'s application that may not be correct. See, *e.g.*, *Lopez* v. *Superflex, Ltd.*, 13 Am. Disabilities Cas. (BNA) 1339 (S.D.N.Y. 2002) (plaintiff withdrew back pay claim). This Court should therefore resolve the issue now.[7]

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[7] Respondents contend their position is supported by principles of administrative deference, implying that EEOC and NLRB have taken the position that *Hoffman Plastic* does not implicate discovery on immigration status. But first, there is nothing to defer to: NLRB interpretations of the NLRA are irrelevant in a Title VII case, and the document that respondents suggest is an "EEOC interpretation[] of Title VII," BIO 14 n.6, is actually an EEOC notice *rescinding* a prior interpretation of Title VII pending its consideration of *Hoffman Plastic*'s implications. See EEOC Directives Transmittal No. 915.002, available at http://www.eeoc.gov/policy/-/docs/undoc-rescind.html. It does not purport to interpret the statute, nor to have any binding effect. Moreover, the agencies' investigative policies do not bear on defendants' discovery rights in pri-

II. Delaying Review Until After Trial Would Irreparably Harm Petitioner And Waste Judicial Resources.

This Court's review at this stage of the litigation – rather than after trial, as respondents suggest, BIO 8 – is essential to prevent a serious waste of judicial and party resources and irreparable harm to petitioner's interests. The right that petitioner has been denied by the court of appeals' decision is the right to *pretrial* discovery of information that is essential to enable it to evaluate its damages exposure, consider and make settlement offers, including offers of judgment under Federal Rule of Civil Procedure 68,[8] and/or prepare for trial. See Pet. App. 33a-35a (Bea, J., dissenting from denial of rehr'g en banc). Denial of pretrial discovery thus undermines federal policy in favor of encouraging settlements, wasting resources. *Id.* 34a n.2. And to the extent settlements are reached, denial of pretrial discovery on immigration status systematically advantages illegal immigrant plaintiffs, undermining federal immigration policy. *Id.* 32a-33a. Post-trial review of the court of appeals' holding by this Court would avert *none* of these harms.[9]

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vate party litigation. The government's law enforcement interests do not turn on the private remedies available to particular employees, and so employees' immigration status may be irrelevant to the agencies but highly relevant in private litigation.

[8] Rule 68 illustrates the flaw in respondent's assertion that delay will not prejudice petitioner. Denying petitioner pretrial acess to critical information about damages exposure means petitioner may either make a settlement offer that is too high, or no settlement will be reached because petitioner will make no offer or too low an offer. In the latter instance, petitioner would lose protection from continued accrual of attorneys' fees, see FED. R. CIV. P. 68; Pet. App. 34a n.2, a harm that cannot be remedied post-trial.

[9] These harms are not minimized by the fact that the threshold question of *liability* under Title VII does not turn on immigration status. Obviously, defendants considering settlement care not just *whether* they may be liable, but *how much* their liability might be.

Respondents contend that this Court only reviews interlocutory appeals of discovery orders in exceptional cases, supporting their argument with two misleading examples. BIO 7-8 (citing *Cheney* v. *United States Dist. Ct.*, 124 S.Ct. 2576 (2004), and *United States* v. *Nixon*, 418 U.S. 683, 690-92 (1974)). *Cheney* and *Nixon* did involve unusual circumstances, and the Court emphasized that fact in order to justify unusual procedural remedies: in *Cheney*, a mandamus order against the district court; and in *Nixon*, certiorari before judgment. Notably, in neither of these cases – nor in any of the cases respondents cite for the proposition that "immediate review [of discovery orders] is 'not ordinarily available,'" BIO 7 – did the district court certify its discovery-related order for immediate appellate review under 28 U.S.C. 1292(b).

In this case, by contrast, the district court *did* certify the order under § 1292(b), and the court of appeals accepted that certification. See Pet. App. 5a-7a. Respondents do not argue that this certification was inappropriate. This Court has not hesitated to review discovery orders in § 1292-certified cases *not* involving executive privilege or any other particularly "unusual" circumstances, BIO 7. See, *e.g.*, *Hoffmann-La Roche, Inc.* v. *Sperling*, 493 U.S. 165, 169 (1989) (employment discrimination case); *Herbert* v. *Lando*, 441 U.S. 153, 157-59 (1979) (defamation case).[10] Similar cases involving

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[10] The Court has likewise, even in rather ordinary cases, reviewed discovery-related disputes that the court of appeals has deemed appropriate for interlocutory review on other bases than § 1292(b) certification. See, *e.g.*, *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct. for the Southern District of Iowa*, 482 U.S. 522, 527-28 (1987); *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 347 & n.8 (1978). Moreover, this Court has reviewed discovery disputes even in state court cases – wherein finality is *jurisdictionally* required – when (as here) review is necessary to avert some kind of harm that cannot be rectified by later review. See, *e.g.*, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 49 (1987); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

review of § 1292(b)-certified interlocutory orders abound outside the discovery context as well. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 512 (1997); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 203-05 (1996); *Finley* v. *United States*, 490 U.S. 545, 547 (1989); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 124-25 (1989).

Indeed, none of these cases even bother raising the question whether this Court's review of an appeals' court's ruling on a properly § 1292(b)-certified question is appropriate. That basis for that omission is clear: denial of this Court's review on non-finality grounds would undermine § 1292(b)'s purpose of facilitating "expeditious termination of litigation in the district courts" by finally resolving certain important legal questions at a relatively early stage. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 172 (1972); see S. REP. No. 2434, 85th Cong., 2d Sess., 4 (1958) (provision is designed to "sav[e] useless expenditure of court time"). Thus, the very principles respondents cite as arguments *against* interlocutory review by courts of appeals and by this Court – judicial efficiency and respect for district courts' control of cases – argue in *favor* of such review in § 1292(b) cases. See BIO 7 (citing, *e.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995)).[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[11] Respondents suggest that this Court delay review to permit the district court to address the propriety of bifurcation of proceedings in the first instance. BIO 20. But petitioners have never asked this Court to decide the bifurcation issue, which may be resolved by the district court on remand in any event. The possibility of eventual bifurcation is no reason to *deny* certiorari: bifurcation could not solve the harms of denial of discovery before trial proceedings begin (but would obviate any of those denial's supposed *benefits* for Title VII enforcement). Pet. 13-14.

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